K & S Circuits, Inc. *and* P.C.B. Workers Local Union *and* Elmer King

K & S Circuits, Inc. and/or K & S Circuit Products, Inc. and/or D-K Sales and Services, Inc. *and* P.C.B. Workers Local Union. Cases 9-CA-11799, 9-CA-12652, 9-CA-12779-2, 9-CA-13927, 9-CA-12779-1, and 9-CA-13462

May 4, 1981

DECISION AND ORDER

On June 27, 1980, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order as modified herein.

The General Counsel excepted, *inter alia*, to the Administrative Law Judge's dismissal of allegations that Georganna Price and Judith Weber were constructively discharged by Respondent. We find merit in the exceptions relating to these employees.

In finding that Price and Weber were not constructively discharged, the Administrative Law Judge relied on the fact that neither of the employees informed Respondent that they were quitting their jobs because of the unfair working conditions to which they were subjected. Therefore, relying on *Unimet Corporation*, 172 NLRB 1762 (1968), the Administrative Law Judge determined that they were not constructively discharged. However, we find *Unimet* distinguishable on its facts, and not controlling in the circumstances presented here.

In *Unimet*, prounion employee Asbell was transferred from the second shift to the first shift, whereupon she did not return to work. Although Asbell twice objected to the transfer, she did agree to work on the first shift. Also, although Asbell had been on the same shift for the 2-1/2 months she was employed, the transfer of employees from one shift to another was a common occurrence and not indicative of an onerous working condition in itself. Therefore, because of Asbell's acquiesence, although reluctant, the Administrative Law Judge found the evidence insufficient to make a determination that she could not have prevailed in getting the respondent to rescind its transfer order, and insufficient to show that she was constructively discharged.

In this case, Price and Weber were both discharged on October 3, 1977, with other employees, because of Respondent's intent to destroy the Union's organizational efforts. They were both recalled in March 1978, and thereafter subjected to the onerous working conditions imposed on all of the recalled employees who had signed union authorization cards. These conditions, found violative of the Act by the Administrative Law Judge, included assignment to a newly formed third shift; isolation from other employees; being required to file as new applicants for work; working without stools at their workplace; being subjected to a newly installed written warning system; and losing overtime and having their regular hours of work reduced. In addition, both employees were given different lunch periods from other employees. Price was ridiculed for inability to perform unfamiliar job functions, and Weber was subjected to interrogation by her supervisor, the wife of Respondent's owner, as to union matters.

Both employees credibly testified that the reason they left their employment was because of the conditions under which they were forced to work, regardless of the fact that they failed to or chose not to inform Respondent of this reason. To establish a constructive discharge, it must be proven that the burdens upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign. It also must be shown that these burdens were imposed because of the employees' union activities.[3] In this case, the activities of Respondent following the March recall of unlawfully discharged employees clearly show that such burdens were placed upon the employees, and are found herein to be unfair labor practices in themselves. Further, it is clearly shown in the record that such actions resulted from the employees' union activities. In addition, the statement by Supervisor Cheryl (Kneisley) Brummerstedt to Supervisor Myers, acknowledging that the recalled employees were being put on jobs they probably could not do and, if they could not, Respondent could not keep them, shows that Respondent's actions were meant to either supply a reason for discharge of the employees or force them to leave.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Chairman Fanning would not find that Respondent has a bargaining obligation dating from September 25, 1977, as there was at that time no demand made by the Union. See his dissent in *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93, 97 (1977).

[3] *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976).

In all the circumstances, we find that Price and Weber resigned from their jobs because of Respondent's discriminatory treatment, and they were constructively discharged.

Although we have found that the failure to inform the Employer here of the reason for quitting does not preclude a finding that Price and Weber were constructively discharged, we agree with the Administrative Law Judge that the record is insufficient to support a finding that employees Harleman, Salyers, or Meyer resigned because of the onerous working conditions, and thus no constructive discharge is shown in their cases.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, K & S Circuits, Inc., K & S Circuit Products, Inc., and D-K Sales and Services, Inc., Phillipsburg, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete the names Georganna Price and Judith Weber from paragraph 2(b).

2. Substitute the following for paragraph 2(c):

"(c) Offer Georganna Price, Judith Weber, Ellen Rue, and Anne Roberts immediate and full reinstatement to the jobs they held before October 3, 1977, and Shirley Horn the job she held before April 13, 1978, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of their discharges on October 3, 1977, and the subsequent discharge of Horn and constructive discharges of Price, Weber, Rue, and Roberts, plus interest."

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This case was heard before me on 11 different dates between September 17 and October 19, 1979. The charge in Case 9-CA-11799 was filed on October 6, 1977, by P.C.B.[1] Workers Local Union (herein called the Union), against Respondent, K & S Circuits, Inc.[2] The original charge in Union on June 15, 1978. The original charge in Case 9-CA-12779-1 was filed against Respondent by Elmer King, an individual, on July 20, 1978. The original charge in Case 9-CA-12779-2 was filed against Respondent by the Union on July 21, 1978. The charge in Case 9-CA-13462 was filed against Respondent Circuits and K & S Circuit Products, Inc. (herein called Respondent Products), and Respondent D-K Sales and Services, Inc. (herein called Respondent D-K), by the Union on February 2, 1979. The charge in Case 9-CA-13927 was filed against Respondent Circuits by the Union on May 31, 1979. Upon these charges, complaints issued against all three Respondents alleging various violations of Section 8(a)(1), (3), and (5) of the Act by Respondent and further alleging that the three Respondents have been a single employer since on or about June 23, 1978. The said complaints were further amended in various respects at the hearing. Respondents duly filed answers to all these complaints, which were consolidated for purposes of hearing, admitting jurisdiction of Respondent Circuits but denying the commerce allegations relating to Respondent D-K and Respondent Products and further denying that the three entities have been a single employer. The answer further admits to supervisory status, within Section 2(11) of the Act, of Daniel Kneisley (president of all three Respondents), and of Wally Smock (vice president and plant manager of Respondent Circuits and officer of Respondent D-K), and of Cheryl Brummerstedt[3] and Michael Kneisley (both supervisors of Respondent Circuits).[4] The answer denies that other individuals named in the complaint were statutory supervisors and further denies the commission of any unfair labor practices. The General Counsel and Respondent filed briefs which have been carefully considered.

Upon the entire record and from my observations of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS AND JOINT EMPLOYER ALLEGATION

Respondent Circuits admits that it is an Ohio corporation engaged in the manufacture and sale of printed circuit boards and related products at its Phillipsburg, Ohio, facility and that, during the 12 months preceding issuance of the amended consolidated complaint, Respondent Circuits sold and shipped goods and materials valued in excess of $50,000 from said facility directly to points outside the State of Ohio. Respondents admit that Respondent Products and Respondent D-K are Ohio corporations but deny any of the three corporations are engaged in commerce.

Since it is admitted that Respondent Circuits meets the Board's discretionary standards, as well as the statutory

[1] This is an abbreviation for "Printed Circuit Board."

[2] As discussed herein, two other corporations, K & S Circuit Products and D-K Sales and Services, Inc., were formed in June 1978 by the sole owner of K & S Circuits Inc., Daniel E. Kneisley. The singular term "Respondent" is used herein to denote only K & S Circuits, Inc., unless there is a necessity for expressly distinguishing it from the other entities in which case it will be referred to as "Respondent Circuits."

[3] The complaint and answer refer to Cheryl Brummerstedt as "Cheryl Kneisley." The individual referred to, until sometime after the events of this case, but before the date of the hearing, was the wife of Daniel E. Kneisley.

[4] All references to "Kneisley" are Daniel E. Kneisley unless "Michael Kneisley" is specified or it is immediately obvious from the context that Michael Kneisley is intended.

requisites, it is clear that that entity is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent Circuits has existed since 1976 when it was formed by its sole owner, Daniel Kneisley. In June 1968, Respondent Products and Respondent D-K were created by Kneisley who is the sole shareholder and the president of each. Respondent Products and Respondent D-K are housed in buildings which are one-half mile from each other and about a mile and a half from Respondent Circuits. Respondent D-K employs six production employees and Respondent Products employs four. When Respondent Products was created, Stephen Stump, maintenance supervisor for Respondent Circuits, became a supervisor of Respondent Products. Wally Smock, who was a supervisor at Respondent Circuits, became a supervisor at Respondent D-K. Just what positions Stump and Smock held in the newly created corporations is a matter of some confusion. When asked what position he held with Respondent Products, Stump replied, "vice president and general manager." There is no evidence that Stump was ever told that he was also the treasurer of the corporation and Kneisley himself was not aware of that fact until incorporation papers were shown to him at hearing. When asked what position he held at Respondent D-K, Smock replied only, "general manager." If Smock was aware that the incorporation papers listed him as vice president and treasurer or that he, in fact, held those positions, there is no evidence of it in the record. In sum, I find the assignment of new titles to Stump and Smock to be a sham. But, at any rate, since both admit to being "general"[5] managers and both are supervisors at Respondent Circuits,[6] the General Counsel has proved common supervision among the three corporations. But more importantly, common supervision and control is made up by the fact that Daniel Kneisley, as sole owner and president, cannot be considered merely a potential force in the management of the corporations. The only incident of actual control exercised by Kneisley in the record is that he passed upon initial wage rates of the employees of the two corporations. However, it strains credibility too much to believe that the creator and 100-percent owner and president of corporations which only employ four to six employees possesses only "potential" control. See *Remke Central Division, Inc., and Kinnaird Body Works, Inc.*, 227 NLRB 1969 (1977). I find Kneisley's protestations that he had nothing to do with the actual day-to-day control of Respondent Products and Respondent D-K to be incredible and I find that he has exercised actual control of the two corporations. Additional relevant considerations are the facts that Respondent Circuits maintains all the personnel files of the three corporations at its office and the three corporations hold themselves out to the public as an integrated enterprise, at least to the extent of using bills with a common format and listing same address and telephone number which is that of Respondent Circuits.

The three corporations constitute a completely integrated enterprise. Respondent Circuits sells completed printed circuit boards and the production process is one which, until the events of this case, was performed under one roof. While Respondent D-K and Respondent Products, at the time of the hearing, had some of their own customers, for the most part Respondent Circuits takes the orders for boards, performs various production functions, and sends them to Respondent Products and Respondent D-K for other steps in production processes with the same machinery that was once used when the entire operation was only at one physical facility. Respondent Circuits receives the products back and ships them to customers of all three corporations.

When the corporations were created, employee Idella Stukins transferred to Respondent Products. In addition, three supervisors (Elaine Smith, Mike McManoway, and Jane Baker) and employees Doris Jamison, Gary Collins, and Junior Stump (father of Steven Stump) transferred from Respondent Circuits to Respondent D-K Sales.

Upon the totality of these factors, I find and conclude that Respondents are a joint or single enterprise and a single employer within the meaning of Section 2(2) of the Act and, as a joint enterprise, are engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent denies that the Union is a labor organization within the meaning of Section 2(5) of the Act. However, there was undisputed, credible testimony that the Union is composed of employees and was formed for the purpose of dealing with Respondent in regard to wages, hours, and terms and conditions of employment. Moreover, Respondent did, for a time, bargain with the Charging Party for precisely such purposes; furthermore, Respondent claims, in defense to the surface bargaining allegation discussed *infra*, that it stands ready to continue such bargaining. Therefore, it is manifest that the Union is a labor organization within the meaning of Section 2(5) of the Act and I so find and conclude.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The principal issues in this case revolve around a self-organizational attempt by the employees of Respondent which began about September 21, 1977,[7] layoffs of 7 of Respondent's employees on September 26, and layoffs of 28 employees on October 3. Other allegations are oriented in the refusal to recall some employees; subsequent recall and discharges (and alleged constructive discharges) of other of the laid-off employees; other alleged

[5] There is no evidence of any managers subordinate to either Smock or Stump at either Respondent D-K or Respondent Products.

[6] When asked where Smock was employed, Kneisley replied "D-K Sales and Service." Kneisley further testified that Smock spent all his working time there. However, the amended consolidated complaint alleges that Smock was employed as a supervisor by all three Respondents at all relevant times (and it states as one relevant time the point at which the three corporations were formed) and this allegation was admitted. Moreover, on a hearing day which convened at the premises of Respondent Circuits, Smock was asked by Respondent's counsel, "Mr. Smock, how long have you heen employed here at K & S Circuits, please." Smock replied, "About two and a half years."

[7] All dates hereinafter are between September 21, 1977, and September 15, 1978, unless otherwise specified.

discriminatory actions taken against the recalled employees; discharge of an employee who had not been laid off; an alleged refusal to recognize the Union dating from September 26; a surface bargaining allegation which dates from March 15; and various other alleged violations of Section 8(a)(1), (3), and (5) by Respondent.

A. *Background*

1. General production process

The business of Respondent is to produce printed circuit boards for all phases of the electronics industry. Roughly, the production process is as follows: The circuit boards, at least those which were discussed at the hearing, are about 12 by 14 inches, are basically made of two sheets of fiberglass epoxy which are laminated to very thin sheets of copper. The copper core is purchased in stock sheets about 4 feet square which are cut to size on a shear. Afterwards the boards are treated so as to produce circuitry, designed pursuant to customer-supplied artwork. Respondent's photographic department takes pictures of the artwork and develops it as a print for each board. From these films, Respondent's programming department makes computer tapes for automated drills. The drills produce holes in which conductors are ultimately placed by the customer. After drilling the boards are sent through a deburring machine which is conveyorized scrubber. The boards are placed in one end of the deburrer and go through scrubbing brushes (which are composed of nylon-impregnated bristles) which eliminate burrs left in and around the holes during drilling as well as clean the surface of the boards. The boards are then sent to electrolysis which consists of a series of tanks containing various fluids. The boards are dipped in one tank after another for the purpose of coating the insides of holes with metal so that there is a conductive surface, as opposed to the fiberglass epoxy inside each hole between the surface and the copper core. The boards are then coated with a photosensitive polymer, a very thin photographic film which is placed on the board and exposed much in the manner that ordinary pictures are developed. The image produced is a positive image of what the board should look like. The circuitry is protected by application of hot solder on the Gyrex machine. A tin-lead plating is placed over the desired pattern and then the board is sent through an etcher, a device to brush away all unprotected copper leaving the printed circuit pattern. The boards are then sent to gold plating for the purpose of attaching connecters. Then any nomenclature is placed on the board; the board is machined to specified size by customer blueprint; then it is sent to final inspection before shipment to the customer.

2. Labor relations history

Daniel Kneisley began the operation in 1966 working by himself. He added one or two employees at a time until the business had steadily grown, at the time of the events of this case, to a total personnel complement of about 60 employees and supervisors.

Before the events of this case, according to Kneisley, Respondent never had a multi-employee layoff. On May 20, 1977, Smock did send a memorandum to various supervisors stating that as of that date "K & S Circuits is placed on a hiring freeze. No additional salary or hourly people will be put on the payroll until further notice. Any replacement must be approved by Dan Kneisley." Despite the effect of the memorandum, the following employees were hired after the announced freeze: Michael Rike, Kurt Hefelfinger, Barbara Moffatt, Carl Hofacker, Lois Seabold, Elaine Kenworthy, Larry Magness, Gordon McCray, and Judy Weber. Magness and McCray were hired for maintenance; Rosemary Smock was hired for the production control office. All the others were hired for production between the date of the announcement and the layoff of September 26.

In addition to having no previous layoffs, several employees and admitted Supervisor Cheryl Brummerstedt testified that, in the past, rather than send employees home when work was slack, Respondent gave them cleanup duty or other work to keep them busy until shifts end.

There is no evidence of an organizational attempt by Respondent's employees prior to the events of this case. Paul R. Hirby, who was employed by Respondent as a supervisor in the machine shop in 1973, testified that that year Daniel Kneisley made a statement to him that "he would never hire a nigger or have a union. He would close the doors first." Hirby further testified that 6 or 7 months before the events of this case, at a time when Hirby was not a supervisor, Kneisley repeated the statement to him, only using the term "a black" at that time. Kneisley testified that he could not remember having made any such statements. I credit Hirby. Kneisley's statement of inability to remember such a remark cannot be credited as a denial. Moreover, the only logical explanation for inability to remember this remark is that Kneisley had made it so routinely that a particular instance thereof had been lost in memory.[8]

There was further credible testimony by former employee Roberta Pike that group leader Donna Lovejoy had, before September 26, stated that Kneisley had made a similar statement to her. Lovejoy's status as a supervisor or agent when the alleged remark was made was denied by Respondent. There is no competent evidence that (before March 15, 1978, as discussed *infra*) Lovejoy possessed any of the authorities enumerated by Section 2(11) of the Act. Specifically, contrary to the General Counsel's assertions, there is no evidence that she was required to exercise any degree of discretion in functioning as a group leader over the employees herein who were performing work which was routine and required little skill. Accordingly, since there is no other basis asserted for binding Respondent with Lovejoy's remarks at the time indicated by Pike, I have not considered Pike's testimony on this point.

[8] I fully appreciate that Kneisley is not personally on trial and, specifically, he is not on trial for his attitude toward blacks or, for that matter, unions. However, the testimony is relevant in demonstrating animus towards the exercise by his employees of their Sec. 7 rights.

B. *Chronology of the Case and Allegations*

1. The September 21 meeting and knowledge thereof

In mid-September 1977, the employees of Respondent began discussing the possibility of creating a labor organization. Employees Nelda Morris, Paul Hirby, and Marlene Victor contacted Attorney Richard Hole who practiced in a small town near the plant. On September 21, the employees gathered at a meeting hall in the community of Gordon, Ohio. Hole passed out slips of paper which designated "P.C.B. Workers Local Union" as bargaining agent to enter into collective bargaining with K & S Circuits, Inc., Phillipsburg, Ohio. Received in evidence were 30 authorization cards. The cards, as I call them, have no blank to indicate date; 28 of the cards bear the unobliterated marking "9-21-77," and Hole testified that any card which bore the date was signed at the initial meeting and dated by himself. The card of Patty Price is dated "9-22-77" after a "9-21-77" marking is crossed out. Hole testified that Price signed the card on September 22, and Price confirmed that she did sign it in the week following the September 21 meeting which she did not attend because she worked the second shift. Employee Michael Wolfenbarger did not attend the meeting either, but his card also bears the marking "9-21-77." Wolfenbarger, when confronted with the card, testified that, although he signed the card on September 22, he, in fact, dated the card "9-21-77" because he was so instructed by someone whom he was not asked to name.

Respondent's counsel properly requested a writing demonstration from Wolfenbarger. Although it is admittedly scant evidence to attempt a handwriting analysis from a simple marking of three numbers, it is clear to me that the "9-21-77" marking on Wolfenbarger's card was not made by Wolfenbarger. While these factors render suspect the credibility of Hole and Wolfenbarger on the specific point of when and how Wolfenbarger's card was dated, and it renders further suspect the testimony of Hole about just when Price's card was actually dated, I find upon the basis of the credible testimony of the two employees that they did, in fact, sign the card before the layoff of September 26. Only 1 of the 30 cards placed in evidence was signed after the layoffs, that of employee Judy Weber who signed her card within a few weeks following the layoff of October 3.

During the evening of September 21, second-shift employee Patty Price, who was one of four employees working with group leader Jane Baker on that shift, approached Baker. Price told Baker that there would be a union meeting that night. Price testified that Baker told her that she should tell this to Kneisley. Price and Baker approached Kneisley. Price's testimony regarding the exchange with Kneisley is severely limited. She testified that she stated to Kneisley that she was not sure if she should join the Union and asked if she would have a job if she did so. She testified that Kneisley replied: "it was up to me to decide whether I wanted to join it or not." Price did not actually testify that she told Kneisley that there was a meeting that night. On cross-examination Price testified that Kneisley stated "he thought it would probably go to a non-union." In view of this fact, it is plain that some collective action was announced to and comprehended by Kneisley. Kneisley testified that all he could recall about Patty Price approaching him was that it was after the layoff of September 26, and that Price expressed concern about the job security of her boyfriend who was also employed by Respondent, and that he replied "that each person could do what they wanted to." Baker, a current supervisor, called as a witness by Respondent, also testified that the information from Price was conveyed between the layoffs. I discredit Kneisley and Baker on this point. Price was certain that the exchange occurred the night of the first union meeting, and there was a dramatic demonstration at the hearing of Kneisley's lack of candor on the point of just when he first became aware of any union activity. At the beginning of the hearing, the General Counsel called Kneisley for examination pursuant to the Federal Rules of Evidence, Rule 611(c), 28 U.S.C.A. The General Counsel, after examination about other matters, asked Kneisley this pivotal question in this case. Kneisley, rather than answering, paused and plainly looked at his attorney for a signal. To his credit, the attorney did no more than give a shrugging motion and wave of his hand, but it was clear that Kneisley was looking for help on the issue. I was forced to admonish Kneisley on the record that the testimony he was to give was only his own. Therefore, on this specific issue, I would discredit Kneisley on his demeanor alone.[9] However, there is the additional testimony of Cheryl Brummerstedt, Kneisley's wife at the time, who was then working in the production control office, and, as admitted by the answer, was a supervisor under Section 2(11) of the Act.[10] Brummerstedt testified that, 4 or 5 days before the September 26 layoff, she was present in the office with Personnel Officer Jim Thompson and Pam Deisher. According to Brummerstedt:

> Jim and Pam and I were in there, just kind of goofing around and Dan came in and sat down at my desk and said, "Well, do you know what they are doing now?" And, you know, we said no. And he said, "Well," he said, "I just heard that they're forming a union and having a union meeting tonight in Gordon."
>
> . . . He said that Jane Baker came in when she got to work and told him that one of the girls that worked for her told her about the meeting.

Brummerstedt named "the girl" as Patty Price. Kneisley, when asked about this testimony by his attorney, stated that he could not remember such an event having happened. The first knowledge, and the reporting of first

[9] Also to discredit Kneisley on this point is the fact that at another point in the hearing he testified that knowledge of union activity came in mid-October and, as just noted, he also inconsistently placed the revelation between the layoffs of September 26 and October 3.

[10] Even without such admission, Brummerstedt, as Kneisley's wife at the time, was in a unique position of confidence with Kneisley and her testimony about his statements and actions is corroborated by abundant evidence as discussed herein, and is plainly admissible. See *RJR Communications, Inc.*, 248 NLRB 920 (1980), and cases cited therein.

knowledge of union activity, would assuredly be indelibly inscribed on the memory of any employer such as Kneisley who had created his own business; and it would certainly be remembered by one to whom labor organizations constitute the anathema they are to Kneisley, as revealed by the credited testimony of Hirby. That is, if the testimony of Brummerstedt were untrue, Kneisley would have unequivocally denied it. Accordingly, to the extent Kneisley's claimed inability to remember the report to Brummerstedt, Thompson, and Deisher was intended to constitute a denial of Brummerstedt's testimony, it is discredited.[11] I find, as credibly testified by Brummerstedt, that Kneisley knew the night of the first union meeting, September 21, that the employees were attempting to form a labor organization.

Brummerstedt further testified that, at sometime between September 21 and the September 26 layoff, she and Kneisley went through a list of employees to select seven for layoff. In describing the process, Brummerstedt testified, "Well, the first three we determined were the three that Dan felt were the most active in the union . . . Nelda, Paul, and Delmar," whom she identified as Nelda Morris, Paul Hirby, and Delmar Lawson. Brummerstedt testified that she and Kneisley did not discuss the relevant merit of the employees' working abilities. They additionally selected other employees. Brummerstedt was asked upon what basis and she testified thusly:

> Q. Did you select anyone else to be discharged?
>
> A. There was a girl in the print room, but I don't remember her name, she had only been there for like a month.
>
> Q. Who selected her for layoff?
>
> A. That was basically—a mutual agreement. I mean we both thought that was a good idea.
>
> Q. Any particular reason?
>
> A. Mostly because she had only been there a short time.
>
> Q. You didn't know at the time of selection whether or not she was a member of the union, did you?
>
> A. No.
>
> Q. Anyone else for layoff on that first time?
>
> A. Well, I know that there was more, but I don't remember.
>
> Q. You don't remember whether you discussed whether they were capable of working well on the job, or anything like that?
>
> A. We might have gone over their work record, but that was not what we were going by.
>
> Q. Why would you go over their work record if it wasn't what you were going by?
>
> A. Because Dan knew that was going to be questioned and he wanted to figure out a legitimate reason.
>
> Q. Did he tell you that?
>
> A. Yes.
>
> Q. How did he say it?
>
> A. He said, "Well, we have to think of something to use."
>
> Q. What was your response?
>
> A. I agreed with him.
>
> Q. But you personally didn't select anyone on the first discharge, did you?
>
> A. I might have—but like I say, I can't remember the people so—you know.

Kneisley generally denied that Brummerstedt helped him to decide whom to select for the September 26 layoff, but he denied none of the just-quoted remarks attributed to him. Brummerstedt was by far the more believable witness, and I specifically credit all of her foregoing testimony.

Virginia Myers was employed by Respondent for 9 years before the layoffs herein. For the last 6 years of her employment she was a supervisor[12] in the inspection department having up to six employees reporting to her, although at the time of the layoffs herein, she had only one employee reporting to her, Orpha Mast, an inspector. Myers, called on behalf of the General Counsel, testified that during the week before the layoffs she had a discussion with Brummerstedt in which Brummerstedt told her that Jane Baker had told Daniel Kneisley that a union was being formed among the employees and asked if employees[13] working with her mentioned a union. According to Myers, Brummerstedt told her that there was an impending layoff "because they learned that there was going to be a union," and that the employees would be told that they were being laid off "because of the EPA and because of lack of work." Myers testified that after this conversation she went into the work area and asked Mast and Waltz if they knew anything about the Union and they replied negatively. Myers testified that she reported this information back to Brummerstedt. This testimony of Myers is undenied, and I credit it.

During the evening of Sunday, September 25, Meyers called her nephew, Michael Wolfenbarger, who at the time had heen employed by Respondent as a production employee in the photography department for a total of about 2-1/2 years. According to Wolfenbarger, Myers "said that she had talked to Cheryl and Cheryl said that Dan had found out about the meeting. He had a list of all the names and there was going to be a layoff of all the people that attended the meeting." This testimony, which I credit, is essentially substantiated by Myers; however, Myers did not mention "a list" in her testimony.

2. Layoff of September 26, 1977

On Monday, September 26, the following employees were laid off: Paul Hirby, Nelda Morris, Jack Harleman, Curt Hefelfinger, Della Hine, Julia Ann Pultz (nee Sanders), and Lois Seabold.[14] All of these employees attend-

[11] Also relevant in this conclusion is the fact that Respondent called neither Deisher nor Thompson to testify. Presumably, if their testimony on this critical point would have been favorable, Respondent would have done so.

[12] That Myers was a supervisor within the meaning of Sec. 2(11) of the Act at all material times herein is not really in dispute. Although the answer formally denies this allegation of the complaint, Respondent's brief acknowledges that she was a supervisor.

[13] Although not an inspector, employee Betty Waltz worked in the same area as Myers.

[14] Neither Seabold nor Hefelfinger testified.

union meeting, although there is no direct evidence of Respondent's knowledge of the fact.

Employee Nelda Morris had been employed by Respondent since April 1972 when on September 26 she was approached at approximately 10 a.m. by Elaine Smith, supervisor of the machine shop. Morris credibly testified that Smith had tears in her eyes and said, "All I know is that I'm told to lay you off. . . . the only reason they've given me is lack of work. . . . I was over there for the last half hour arguing with management to let me keep you and lay some other less seniority [sic] person off. . . . they said I have to lay off these certain people." Smith told Morris that she would be paid the entire day's pay. Morris further credibly testified that on that day there were racks in her area which were filled with boards which were ready to be drilled by her.

Employee Paul Hirby, also a machine shop employee, was laid off by Smith at noon. Hirby testified that Smith "said it was termination and lack of work. I was being terminated because my job was no longer necessary, and that there was a lack of work." Hirby also described stacks of boards ready for drilling that were in the machine shop area at the time of his layoff.

Machine shop employee Jack Harleman was laid off by Elaine Smith at noon. Harelman, as Morris, described Smith as in tears. According to Harelman, Smith told him that he was being laid off because of "lack of work" but that he would be paid for the remainder of the day.

None of this testimony regarding Smith's statements to the employees, or her lachrymose condition, was denied by Smith, who was called by Respondent.

Employee Della Mae Hine testified that at the time of the layoff she had been employed by Respondent since 1974. She worked in the gold room under Supervisor Lee McNutt.[15] Hine testified that McNutt called her into her office at 8:30 a.m. September 26 and told her that she was being laid off for lack of work. McNutt escorted Hine to the timeclock and, on the way, Hine asked McNutt "if I was being laid off because of the Union." McNutt would not answer her. Hine testified that, during the week before the layoff, McNutt told her that she could have 10 or 20 hours of overtime if she wanted because there was so much work to be done. In fact, Hine worked 8.9 hours overtime the week during September 15, and 6.6 the week ending September 22.

Julia Sanders Fultz testified that she had been employed by Respondent since August 1976 when she was laid off on September 26, at which time she was employed in the reflow department under the supervision of McNutt. She testified that, after she went to work on September 26, McNutt called her into her office and told her that "he hated to lay me off but due to lack of work that I was laid off." When asked if there was any further conversation Fultz replied, "He told me that we both knew the real reason as to why I was being laid off." Fultz further testified that in her department she had been working by herself that week and that, not only was there plenty to do, but work had backed up. Fultz worked 5.5 and 2.2 hours overtime the 2 weeks before this layoff.

[15] McNutt was stipulated to be a supervisor within the meaning of Sec. 2(11) of the Act.

Employee Ola Davis testified that on the date Fultz was laid off she approached McNutt and "I asked Lee why she [Fultz] was laid off, and he told me that he had a list of names, a list of people that he had to lay off, and he said he didn't have any other choice. That he had to lay them off, but he really didn't want to do it . . . . I asked him why she was laid off and he said, you know why she was laid off, and I know why she was laid off . . . . He also told me that they thought he had something to do with what was going on."

This testimony by Hine, Fultz, and Davis was credible. Also noteworthy is the fact that Respondent did not call McNutt or explain its failure to do so. Presumably, if it had done so, his testimony would have been unfavorable to Respondent.

About a week before the layoff of September 26, according to the undisputed testimony of former employee Judy Ann Hall, she overheard Brummerstedt telling Supervisor Pat Haworth that she was upset because Daniel Kneisley was promising jobs and possible due dates which could not be met because there were several jobs then in the shop which were overdue.

On the afternoon of September 26, Respondent posted a notice to all employees naming the seven employees who were laid off stating the only reason as "lack of work."

3. Alleged demands for recognition

Union Attorney Hole testified that, on September 26, he sent, by regular mail, a formal letter to Kneisley demanding recognition of the Union, and the letter was never returned. Kneisley denied receipt of the letter by Respondent. While there is a common law presumption that a properly addressed letter is delivered in due course of the mails, there is no testimony that the letter was, in fact, properly addressed when mailed. Hole did not testify that he typed the envelope himself or that he personally mailed the letter.[16] Under the circumstances I find that there is no presumption that the letter was received by Respondent in the mails.

Hole also testified that, on September 26, he telephoned Respondent's place of business and spoke to Smock. By Hole's testimony, it cannot be told if he placed this call before or after the letter was supposed to have been sent, or before or after he learned of the layoff of seven employees that date, assuming that he did learn of the layoffs on the day they occurred. Hole's testimony of the conversation is:

> THE WITNESS: Yes. I called K & S Enterprises and talked to Wally Smock, who is vice president, and informed him that the Union was being—that there was a union and that we wished to negotiate, and informed him of what had happened.

Smock's testimony about the substance of the call is:

[16] Compare *Birmingham Ornamental Iron Company*, 240 NLRB 898 (1979), and *S. Frederick Sansone d/b/a S. Frederick Sansone Co.*, 127 NLRB 1301 (1960), where the presumption was invoked because such testimony was adduced.

A. The telephone call came in for Dan and he was busy, so I thought that I would help him out a bit, so I took the call. The gentleman on the other end of the line identified himself. And he says, "I must talk to Dan Kneisley."

And I said, "Well, he is tied up right now." And he said,—and I can't quote you exactly because I don't remember exactly what he said, but he said, "You can't do this" and really got upset over the phone. "You can't do this. I've got to talk to Dan Kneisley." He raised his voice. And I said, "Well, I'm sorry, he is busy." And he said, "Well, I am going to see Dan Kneisley and I will be out there in a few minutes to see him. You tell him that." And that was the end of the conversation.

Smock and Kneisley testified, without contradiction, that no one appeared at the plant that date or thereafter purporting to represent the Union. Smock further testified that, although Hole gave his name and stated that he was an attorney, he did not, although he was "upset," mention whom he represented. It is incredible that Smock would politely entertain an irate telephone call from someone who was representing himself to be an attorney, telling Smock that he could not do what he was doing (without specifying what it was that could be done), and Smock did not know, or even ask, who it was that was making such protestations. I find that Hole did tell Smock that he represented the Union and, as Hole further testified without specific contradiction from Smock, that a union was being formed and that negotiation was its objective.

4. Layoff of October 3, 1977

Employee Ola Davis testified that, on Thursday, September 29, Brummerstedt said something to her which upset her. According to Davis, "I got upset and I went over and talked to Lee [McNutt], and he told me to calm down. At that point, I was ready to quit, and he says, well, calm down, he says, come Monday you'll all be laid off anyway . . . . Dan has it all figured out in his head how he's going to beat this thing." Again, this testimony regarding McNutt's statement about the layoffs is not factually denied, and I find it credible.

On October 3, Respondent informed 28 production employees that they were laid off. (Since Kneisley testified that none of these employees was given recall rights, the appropriateness of the term "lay off" rather than "discharge" is questionable. However, since that is the term used in effectuation of the removal of the production employees from the plant, as well as the term utilized throughout the hearing, it is the term I use here.) All but six of the affected employees had previously signed authorization cards for the Union.[17] As discussed *infra*, Kneisley testified that he told the supervisors announcing the layoff to tell the employees that there were three reasons for the layoff of October 3: Too much scrap, problem with the Ohio Environmental Protection Agency, and lack of work. According to the employees who testified about the events of October 3, the layoffs were handled in each case thusly:

Betty Baker credibly testified that she was told by group leader Donna Lovejoy,[18] "You are laid off because of lack of work, scrap, EPA has closed them up." Baker replied to Lovejoy that Lovejoy knew this was not true and, according to Baker, Lovejoy replied, "I know but this is what I was told to tell you." Although the General Counsel failed to prove that Lovejoy was, at the time, a supervisor within the meaning of Section 2(11) of the Act, the complaint further alleges that Lovejoy was an "agent" of Respondent. Lovejoy was one of those commissioned by Kneisley to deliver the announcement of the October 3 layoff, including the reasons therefor. In so doing, she acted as an agent of Respondent and Respondent is bound by her statements under Section 2(2) and (13) of the Act. See *Helena Laboratories Corporation*, 225 NLRB 257 (1976); *Broyhill Company*, 210 NLRB 288 (1974). As noted, Supervisor Meyers testified that Brummerstedt told her before the first layoff that employees would be told that the reason therefor was scrap, EPA, and lack of work. The fact that the tripartite reason was used only at the second, and not the first, does not detract from the fact that management had decided to advance it as a reason for contemplated layoffs. Respondent is further found by Lovejoy's admission that the reasons advanced were untrue because Section 2(13) provides principals are so bound whether the acts within the general scope of the agency "were actually authorized or subsequently ratified."

Employee Ola Davis credibly testified, "I was drilling some boards and Lee [McNutt] came up to me and told me to stop what I was doing. He said I was laid off for 30 to 90 days, and he said, it was because of the EPA, and lack of work." There was no mention of scrap by McNutt. McNutt immediately walked her to the timeclock and punched her out.

Employee Gary Flory was told by Supervisor Elaine Smith that the layoff was because of the EPA (with no mention of scrap or lack of work) and the layoff would last only 60 days.

Employee Judy Ann Hall was told by Supervisor Haworth that the layoff that date was because of scrap, EPA, lack of work, plus production cutback.

Employee Shirley Horn was told by Supervisor McNutt that the layoff was because of EPA problems and lack of work (with no mention of scrap). When she was so told she was in the middle of a job which McNutt would not let her finish, he required her to cease working and ushered her from the plant.

Employee Harry Jordon was laid off at 1:30 p.m., being told by McNutt that the layoff was because of pollution problems (with no mention of scrap or lack of work), and that the layoff may be 6 months or longer.

Employee Delmar Lawson (then the president of the Union, although there is no evidence that Respondent knew of this) testified that McNutt informed him that company management had had a meeting and that he

[17] The nonsigners were Greg Harris, Glenna Long, David McCune, Judith Weber (who testified that she signed her card after the layoff), Mike Rike, and Ellen Rue.

[18] Lovejoy, admitted to be a supervisor after April 15, did not testify. Presumably, had her testimony been favorable to Respondent, Respondent would have called her.

was instructed to tell employees that there was going to be a layoff because of lack of work and because of Environmental Protection Agency standards. There was no mention of scrap to Lawson. Lawson further testified that McNutt said, "We both know the real reason why the layoffs," and "I just told him, I said, 'Yes, I know the reason. I've heard.'" Lawson testified, without contradiction, that there was then a great deal of work in his area and the evidence shows he worked 11.9 hours overtime the week ending September 29, 11 hours overtime the week ending September 22, and 8.2 the week ending September 15.[19]

Employee Scott Myer credibly testified that he was told by McNutt early in the afternoon that "they were closing the place down because of EPA" (with no mention of scrap or lack of work).

Employee Roberta Pike credibly testified that she was laid off by Donna Lovejoy, who "told me I was laid off for two reasons, lack of work, and EPA, and she had to tell me those reasons . . . . We were sort of laughing and she said, 'we know the real reason.' I said 'yes, because of the union,' and she looked at me and said, 'yes.'"

Employee Patty Price, who was employed on the second shift, was told by Second-Shift Supervisor[20] Jane Baker that the reason for the layoff was lack of work and EPA (with no mention of scrap), and that the layoff would be for a minimum amount of time.

Employee Georganna Price was laid off by Supervisor Elaine Smith who said that the layoff was because lack of work, scrap, and EPA but that it would last for no more than 60 days.

Employee Anne Roberts testified that Supervisor Elaine Smith told her that the layoff was because of EPA (with no mention of scrap or lack of work) and that she would be called back within 60 days.

Employee Elaine Rue was told by Supervisor Haworth that she was being laid off because of EPA and lack of work, with no mention of scrap.

Employee Idella Stukins testified that Supervisor Elaine Smith told her that she was being laid off because of EPA and that there was no work (with no mention of scrap). Stukins is the only employee who agreed that that there was no work, "because the shelves were empty" in the drilling department. Stukins worked at the deburring machine, not in the drilling department, and the basis for her observation and conclusion was examined by neither party.

Employee Marlene Victor testified that her supervisor, Elaine Smith, called her away from her production area and told to gather her belongings. Victor asked if she was getting laid off and Smith refused to say because "I can't tell you because I have to follow rules, I have to take you upstairs and tell you." The two women went to an upstairs office and Smith said that Victor was laid off because of EPA, scrap, and lack of work.

Employee Judith Weber was told by Supervisor Haworth that she was being laid off from her job in the programming department because there was no work (without mention of scrap or EPA).

Employee John Whiting was also told that he was being laid off by Haworth, who said it was due to lack of work and EPA, with no mention of scrap.

Employee Michael Wolfenbarger was also told by Haworth that the reasons for the layoff were EPA and lack of work, with no mention of scrap.

With the singular exception of Stukins, all the employees who testified on the subject stated that there was a normal or greater than normal amount of work to be done, in each of their areas, and no supervisor, including Kneisley, testified that there was not even enough work to finish the day of October 3.

In the several months following the layoff, Respondent did recall Betty Baker, Shirley Horn, Scott Myer, and Mike Rike, and David McCune and hired eight new employees.

5. Defenses for the layoffs

a. *Employee performance and profit ratio*

At the beginning of the hearing, when called by the General Counsel pursuant to Rule 611(c) and asked when the decision to lay off employees on September 26 was made, Daniel Kneisley first testified that he had made "a definite—that definite decision I made was probably—the layoff a good month to 6 weeks even before that [September 26] but I fought it because I did not under any conditions want to have to lay them off." Kneisley later testified that he made the decision on a camping trip over the weekend before Monday, September 26. He acknowledged that he had not conveyed any word to any employee that any layoffs were in the offing. He did claim that he did discuss the possibility of layoffs with his supervisors "because that is what would have to be the results if things did not straighten up." When asked which supervisors he discussed the matter with, Kneisley answered, "Sir, I cannot remember now." Kneisley was called at several times during the hearing to testify and at none of these did he mention any supervisors with whom he spoke prior to the layoff of September 26 about the potentiality of a layoff. None of Respondent's witnesses, including all supervisors who testified on behalf of Respondent, testified that they had foreknowledge of impending layoffs or knew that Kneisley was even contemplating layoffs.

Kneisley testified that the reasons for the layoffs were lack of work, problems with the Environmental Protection Agency, and scrap, and that he instructed his supervisors to tell that to all employees who were laid off on both September 26 and October 3. He stated that he told the supervisors to tell the employees, "As we got things changed in the EPA, we would call them back, that and as we got work." However, Kneisley acknowledged further that no recall rights were extended to any of the laid-off employees.

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[19] Although usually (but not always) in lesser amounts than Lawson, the number of production and maintenance employees working overtime in three weekly payroll periods preceding the October 3 layoff were: 20 for September 15; 28 for September 22; and 29 for September 29.

[20] Baker was promoted to "supervisor," without change of duties or responsibilities, on the day of the first layoff, September 26.

When called in defense, Kneisley was asked what problems Respondent was having in September and October 1977. Kneisley testified:

> The backlog was declining and it would get much worse because of very dissatisfied customers because we were not making their delivery dates. The EPA changes that had been done to that point just were not working out; the equipment, the people which coupled with a high internal scrap rate and then the—especially in September beginning the tapering off of dollar sales or gross sales and shipments.[21]

Kneisley stated that he went through "many, many lists and many ways of trying to figure out with people" how Respondent's threefold problems could be solved. None of the lists nor any of the "people" with whom he spoke was produced. Kneisley testified that these lists were compiled to pick the most qualified people to keep.

Kneisley testified that, on the afternoon of September 23, he received a weekly statement from his accounting office which reflected that the monthly sales to date were $37,248.41 and the monthly payroll to date was $45,445.69, giving a shipped sales to monthly payroll to date ratio of 56 percent. Kneisley testified, "In this type of manufacturing business if your overall payroll exceeds 30 percent of your gross sales you have—you have a problem some place, a very definite problem."

Kneisley testified that, in considering these figures and the results of an employee opinion survey which had been conducted several months before and reported negatively earlier that month, "it seemed that the company and things just were not working out. When I saw economically it was going down, I knew I had to start reducing expenses. I had to, or we wouldn't—we wouldn't be there another 30 days."

In explaining how he chose the employees for the September 26 layoff, Kneisley testified:

> To decide on the first layoff I took the areas that either they were not producing efficiently or there was an excessive number of people in the area or they were nonqualified to really do it with that kind of equipment or they were not doing it. Those were the factors on the first layoff.

As noted, in testimony which I discredit, Kneisley denied that his former wife, Cheryl Brummerstedt, had helped him in his selection of employees to lay off.

Kneisley then proceeded to enumerate specific reasons as to why each of the seven employees was chosen. According to Kneisley: Curt Hefelfinger was selected because he was a rather new employee, he was on the electrolysis line which "wasn't working out" and McNutt had told him that Hefelfinger would be working there only until he could find another job. Lois Seabold was selected because she was in the print room and there were too many employees in that department. Nelda Morris was chosen because "Nelda just wasn't doing the jobs and drills were not sharpened properly and [were] mixed up. Material was sheared and gouged. The patterns were all beat up." No specific defect of Morris' performance was testified to by Kneisley. Elaine Smith, who directly supervised Nelda Morris in drill sharpening, was called by Respondent. When asked if she had any problem with the work of Morris and Gary Flory (who performed the same work at the same time as Morris), Smith replied, "Not a whole lot." When asked to be specific, the only factor she could mention was that the drills were not always checked for sharpness after use. She did not distinguish between any particular failing in this regard between that of Morris and Flory who was praised by different supervisors at the hearing as an exemplary employee. Smith admitted on cross-examination that she considered both Flory and Morris good employees.

Further, according to Kneisley, Jack Harleman was selected for the September 26 layoff because he had been in the shearing department and the work there was inferior. The only defect in Harleman's performance to which Kneisley alluded was that Harleman liked to argue. Della Hine was chosen to be laid off from the gold room because "their work they were getting out was very, very little. Everything that was coming out was virtually scrap." No defect on Hine's part was alleged. Paul Hirby was chosen because he did not seem to want to try to adapt to new procedures. Julia Sanders Fultz was chosen because she was incompetent to run the hot air leveling machine, or the Gyrex. Seabold was selected because she was a fairly new employee according to Kneisley when he was led to that answer by counsel. When testifying, Kneisley did claim that there was lack of work for any of the employees laid off on September 26.

Kneisley denied that the layoffs were based in whole or in part upon known or suspected union activity or membership of any of the employees.

Kneisley testified that on Friday, September 30, he received another weekly statement which reflected shipped sales to date as $94,645.13 and monthly payroll to date as $60,527.58 for a ratio of 60 percent payroll-to-shipped-sales ratio. From this Kneisley could figure that he was going to lose about $50,000 that month and based upon this realization:

> Q. (By Mr. Stamper) What happened on October 3, 1977, Mr. Kneisley?
>
> A. That is when we laid off and cut the plant core back to—stripped it clear back.
>
> Q. Why was that done?
>
> A. I had to reduce costs drastically and quick and also accomplish some very, very large feats ahead in getting all the system and everything of the EPA changed because we were already past their deadline.
>
> Q. You retained all maintenance men?
>
> A. Yes.
>
> Q. Including Elmer King at that time?
>
> A. Yes.
>
> Q. What triggered your action in laying these employees off on October 3?
>
> A. It was definitely from the—conclusively from the statement of September 30 on that which the

[21] In Respondent's terminology "sales" means "shipped sales."

> condition of the company had not improved and I absolutely knew I had no choice. And I knew because of customers being very upset in a very few months it was going to be very difficult or K & S to get work because we had many dissatisfied customers. And with that plus faced with the horrendous expenses of the EPA and just the changing of all the processing that is really—I knew of no other way. I could not think of any other way of doing it, and even then in the back of my mind I really wasn't sure. I never told anybody but I still didn't even know if that company was going to make it and I figured I would give it a try.

A list of the personnel who were retained was received in evidence.[22] The personnel retained to perform production, according to Kneisley, were those "receptive to change." This included only group leaders, inspectors, office employees, and supervisors and part-time employee Michael Scott and Betty Waltz (who had responded negatively to Meyers' interrogation).

One of the supervisors who was retained was Wilbur Crawley, who had become quality control supervisor in August. Crawley replaced employee Della Mae Hine in the gold room but, as Crawley acknowledged: "I didn't know nothing about gold plating at that time, either; I didn't know nothing about gold plating. I knew good or bad, but the process I did not know." Another retained was Baker who was promoted on September 26.

Kneisley then testified that he and Brummerstedt then compiled a list for "stripping the whole plant back." Kneisley was asked by his attorney why each employee was laid off on October 3. In response to each name, Kneisley named the department in which the employees worked, named various types of troubles that were being had in the department or that the department was just being cut back. He did specifically name Marlene Victor as having trouble herself in handling her share of production, but otherwise he did not name any specific deficiency on the part of any employees involved, and it is undisputed that none of the employees had received warnings that inferior production, collective or individual, might affect their tenure of employment.

Michael Kneisley, brother of Daniel and Respondent's chemical engineer over quality control, advanced generalized criticisms of the work force as well in attempting to lay blame for the scrap generated just before the layoffs. On direct examination his testimony was:

> Q. Did you attempt to correct these problems?
> A. Yes, that was my job, to correct problems.
> Q. Were you successful prior to the layoff?
> A. No, as a rule I was not.
> Q. To what do you attribute your failure?
> A. Failure mainly to have the support of everyone—of the working people to correct it, to understand and comprehend where the scrap was coming from.

On cross-examination, Michael Kneisley was asked the obvious:

> Q. Did you recommend that some corrective action be taken to discipline these employees?
> A. My job was to deal with scrap. It was not to separate out individual people.

When attempting to cite deficiencies in the silk screen department, Michael Kneisley did not name any employee who had done anything wrong; he stated that the employees had been carefully instructed by the supervisor, but the employees were simply refusing to follow his instructions, but he could not remember who the supervisor was. At another point, when advancing blanket criticisms of employees who worked with the Gyrex machine, he named McNutt as the supervisor involved. Counsel quickly corrected him by stating: "Would it jog your memory if it was Mr. Crawley?" Kneisley agreed. More blatant leading is difficult to imagine, but it is what it took to get Kneisley back on the track. Therefore, I do not credit the generalized, amorphous criticisms of employee performance asserted by Daniel and Michael Kneisley. Additionally, one Willard Mason who was hired as a "consultant" by Respondent shortly before the layoffs offered blanket criticisms of the employees, although he acknowledged that he worked with none of them. The only specific criticism of employees he conveyed to Daniel Kneisley was dismissed out of hand by Kneisley, as Mason acknowledged. Crawley offered other sweeping criticisms of the work force (including Supervisor McNutt), but acknowledged that he recommended no layoffs.

b. *Reasons given employees*

As noted, the tripronged reasons offered the employees for either or both of the layoffs were: (1) excessive scrap, (2) lack of work, and (3) problems with the Ohio Environmental Protection Agency. The evidence on these points is as follows:

(1) Scrap

Respondent placed in evidence records which reflected the value of production scrap for certain months preceding the layoffs as follows: July, $12,368; August, $14,538; September, $22,090; and October 1977, $4,503. Respondent places the responsibility for this volume of scrap entirely upon the production employees, citing their collective faults as described above.

Several witnesses testified that scrap was a longstanding problem, but no scrap records before or after these months were offered. Also John Goode, Respondent's certified public accountant who compiled voluminous records for Respondent's defense in this case, acknowledged that the scrap figures were not exact in that sometimes extra boards were made for orders and some are placed in stock for later shipment and these may, or may not, be properly categorized as scrap. The General Counsel brought out on cross-examination that shipments

[22] Respondent attacked the credibility of Brummerstedt on the ground that she denied participating in the decision as to who would be laid off on October 3. Brummerstedt was not shown the list of personnel to be retained which Kneisley testified that he and she made up together. Without such confrontation I shall not conclude that Brummerstedt was lying when she said she did not participate in making up a list of employees who were to be laid off.

were made without corresponding "runs" being reflected by Respondent's records so that it is reasonable to assume that under Respondent's accounting procedures certain "scrap" was actually stocked. In short, as Goode further acknowledged on cross-examination, the 4 months' figures represented a trend in scrap rather than actual scrap figures.

Respondent also placed in evidence a summary of rejections from customers for the year 1977 showing a wide fluctuation from as low as $322 worth of products rejected in November to a high of $7,250 in July. Respondent had $3,439 worth of rejections in the month of September. Therefore, in the month of September, immediately before the layoffs in question, Respondent's scrap plus rejections totals $25,000. If there was any other month in Respondent's history which combined scrap and rejections to such great amount, it is not disclosed in the record; however, only 1 year's rejection records and 4 months' scrap records were offered.

(2) Lack of work

Respondent's record of shipped sales shows that they increased from $95,000 in September to $133,500 for the month of October. Presumably part of the October shipped sales was of products manufactured in the preceding months especially since, as Kneisley testified, Respondent was behind in delivery dates. Moreover, there was a sharp decline to $77,208 worth of shipped goods in November and $85,912 in December. Finally, it is to be noted that the records of Respondent's "ending balance" or backlog at the end of relevant months which were placed in evidence were: July, $296,000; August, $248,000; September, $234,000; October, $221,000; November, $247,000; December, $191,000; January 1978, $149,000; and February, $55,700. In short, Respondent had approximately a quarter million dollar backlog of orders at the time of the two layoffs and this backlog did not materially depreciate until January 1978. Further, revelant to this consideration is that new purchase orders had shown a steady increase from July 1977 through November 1977, but took about a 70-percent drop in December followed by similarly poor months in January and February 1978. That is, backlog remained high or at least steady until there was a drastic drop in purchase orders during the month of December 1977.

(3) EPA problems

In the production process described above, there has been a problem regarding the effluents discharged into a local stream. The Ohio Environmental Protection Agency, which is charged with the responsibility of enforcing Federal environmental protection laws, has, for several years previous to this case, been in regular contact with Respondent regarding its compliance with those laws. A letter by Kneisley to the Ohio EPA dated April 17, 1978, recites that, as early as 1972, Respondent had set its own goals in an attempt to reduce pollution and it enumerates various steps that had been taken in that regard. According to the testimony of Craig M. Cooperrider, authorization and compliance representative of the southwest district office of the Ohio EPA (and correspondence submitted along with his testimony and that of Kneisley), after a series of delays, Respondent, by letter dated March 14, 1977, was given a deadline of July 1, 1977, to come in compliance with the EPA laws. The letter pointed out that Respondent could be subjected to fines as high as $10,000 per day for noncompliance. The July 1 deadline came and went without any action by the Ohio EPA. On November 10, 1977 (after both layoffs), Respondent received another letter from the Ohio EPA regarding pollution problems; the letter pointed out that failure to comply with the department's requirements "may be subject to enforcement action pursuant to the Ohio revised code." The letter requested that the department be informed within 10 days as to the reasons for "these excursions" as well as a description of the steps Respondent has initiated to prevent further recurrence. On November 18, Respondent requested a 15-day extension of the time to reply to the preceding letter. On December 7, the agency denied Respondent's request reciting a series of delays beginning with Respondent's missing of an October 21 deadline to submit detailed plans for the necessary changes, further noting that on November 17, 1977, an agent of its office had visited the plant and "was told that the necessary equipment for your treatment facilities was not yet on the site at your plant," and concluding with the demand for explanation of the delays and a construction of the required facilities and a warning that Respondent's alleged continued violation was subject to prosecution, and stating "failure to respond to this letter by the date mentioned above will result in a recommendation by this office that legal proceedings be initiated against K & S Circuits for the violations noted." Although the letter of the preceding March 14 had mentioned the possibility of fines, this was the first threat of a recommendation that litigation be instituted. No communication from the Ohio EPA received by Respondent before the layoffs alluded to a possibility of legal proceedings to close Respondent. In fact, no litigation was initiated against Respondent until spring of 1979. Copperrider testified, without contradiction, that the procedures of the Ohio EPA are to exhaust all administrative possibilities (including encouraging voluntary compliance) before turning suspected violations over to the Ohio state attorney for prosecution. Such prosecutions are, of course, within the discretion of the Ohio attorney general.

Daniel Kneisley testified that Wally Smock was first in charge of effectuating installation of the machinery needed for EPA compliance and for making necessary changes in Respondent's facilities for accommodation of that equipment. According to Kneisley, Smock announced in August that he could no longer perform this job because he was not given cooperation "by people." Smock testified but was asked no questions on this point, and just who was failing to cooperate, and how, was never specified. The work was being performed by Respondent's maintenance employees. These employees, as acknowledged in a letter dated March 8, 1977, from Respondent to the Ohio EPA, were lacking in "proper skills." On November 7, or about a month after the second layoff, Respondent hired Steven Stump to super-

vise the maintenance crew to construct the necessary modifications of the plant as well as perform routine maintenance. Stump possessed a high school education, had previously worked as a maintenance man in another local plant, and had no previous training regarding effectuating compliance with environmental protection laws. On March 28, 1978, Stump discharged the three maintenance crew members working under him (for the stated reason that they possessed insufficient skills to perform anything but janitorial work) and hired other maintenance crew members who had such backgrounds as working in service stations and the like. Stump acknowledged that he was untrained in the crafts of plumbing and electrical work, but stated that the few modifications which he could not handle were accomplished by subcontractors. The volume of work by subcontractors was not placed in evidence. Therefore, it appears from this record that all, or substantially all, of the modifications made after the March 14, 1977, letter from the Ohio EPA was performed by semiskilled, or unskilled, labor under the direction of Smock until August 1978 and Stump after November 7, 1978; apparently there was no one in the interim.

Need for immediate plant modifications which would satisfy the Ohio EPA was specifically advanced as a factor precipitating the October 3 layoff, and Respondent offered testimony that it was frenetically attempting to have those changes made. But, according to the testimony of Steven Stump, who was hired on November 7 to supervise the changes:

> Q. (By Mr. Stamper) Well, this work that we are speaking of, was it already started when you were hired?
>
> A. A lot of it wasn't really started, a lot of it was planned. I guess you could say it started when they planned it, but the actual work—well, I could say it had been started but they hadn't gotten very far. I'd say whoever was doing the work was at a standstill. They weren't making progress.

As previously noted, the "whoever" who preceded Stump as supervisor of the maintenance crew attempting to construct the modifications was Smock who had given up on the project in August, according to the testimony of Kneisley.

6. Settlement agreement of March 8, 1978

On March 8, 1978, a hearing was scheduled for litigation of the charges in Case 9-CA-11799. After the hearing opened before an administrative law judge, and after Kneisley inspected all the authorization cards, the parties reached an oral settlement agreement providing as follows: Respondent agreed to recognize the Union as representative of the production and maintenance employees;[23] Respondent agreed to "recall" from layoff 14 employees who were not present were to be placed on preferential lists; finally, the agreement recited: "The remaining laid-off employees did not desire reinstatement and therefore agreed to remit, through the Union to the Company, individual waivers of reinstatement." The Employer agreed to remit to the Union $20,000 as satisfaction of all claims arising from the matter, $8,000 of which was to be paid, and was paid, immediately and the remainder in six equal monthly installments commencing 6 months after the initial amount was paid. The Union agreed to withdraw the charge.[24] The administrative law judge approved a withdrawal request submitted by the Union and the complaint was dismissed.

7. Creation of the third shift and abolition of the second shift

Almost immediately after the settlement agreement was consummated, Respondent created a third shift and, about April 15, abolished the second. The third shift remained in existence until on or about August 6, 1977, when the third shift was abolished and all employees were returned to the day shift. As detailed *infra*, within a month after the third shift was created, all card signers[25] had been assigned to it,[26] and, conversely, there were no card signers left on the first shift. When called at the first of the hearing pursuant to Rule 611(c), Kneisley denied that the third shift was intended to be comprised only of employees involved in the settlement agreement. But then Kneisley testified that it was decided that his brother, Michael Kneisley, who was then a nonsupervisory chemical engineer, and his ex-wife, Cheryl Brummerstedt, would supervise the third shift and "this is what we felt they would be able to give the best guidance to these people," referring to the ones involved in the settlement agreement.

Michael Kneisley had been employed by Respondent since August 1973. Immediately prior to the layoffs, he was in quality control and process control but was not a supervisor. After the layoffs, as Michael Kneisley put it, "I did take on the responsibility of production and problem troubleshooting." Michael Kneisley testified that, upon execution of the settlement agreement, he was given sole responsibility to place returning employees and "due to the short notice . . . the only solution, I felt, was to start a third shift . . . I established a third shift." Michael Kneisley further testified that further reasons for starting the third shift were:

> . . . the first shift was a smooth running shift. I felt it was stablilized enough so that any EPA changes could be made during the first with a minimum amount of disruption. The establishment of a third shift meant we could, if need be, not run a process

[23] The complete unit description is:

All hourly production and maintenance employees at the Company's Phillipsburg, Ohio facility, but excluding all other employees including office and clerical employees, technical employees, professional employees, inspectors, sales employees, guards and supervisors as defined in the National Labor Relations Act.

[24] After closing of the hearing, an agreement embodying these terms was drafted, but it was signed by neither party. There is no dispute that the above was the terms of the agreement recorded on March 8.

[25] Or "union people" as the third-shift supervisor, Cynthia Leffew, referred to all employees who were on the third shift.

[26] Card signer Harry Jordon referred to the shift to which he was ultimately assigned as the "second" shift. However, from the context and from Resp. Exh. 44, which charts the shift transfers, it is clear that Jordon was on the third shift.

during the day, the changes needed to be made, make up that process at night.

Michael Kneisley did not testify that the second shift was abolished and the third shift established to give the maintenance crew room to make changes required by the EPA. In fact, when asked if he remembered the reason the second shift was abolished, he replied that he could not recall the reason. Daniel Kneisley testified that the second shift was abolished on April 15, as the recalled employees were returning, for the purposes of making way for the EPA changes being performed by the maintenance crew.

8. Operation of the third shift

a. *Hours*

The third-shift's hours were 11 p.m. until 7 a.m., and the hours of the first were from 7:30 a.m. until 3:30 p.m. No explanation of this half-hour hiatus was offered, although Kneisley pointed out that the employees on the third shift were paid the half hour.[27] Several of the third-shift employees testified that, upon being recalled, they were forbidden to go to the work area at starting time; rather, they were instructed to go to the lunchroom to receive their assignments for the night. By this procedure, and by the unexplained half-hour delay in starting the first shift, the third-shift employees were denied all contact with the employees of the other two shifts.

b. *Transfers of previously recalled employees to the third shift*

Some of the employees who were the subject of the charges in Case 9-CA-11799 had been recalled prior to the March 8 settlement agreement conference: Mike Rike on October 27, Patty Price on October 29, Scott Meyer on November 3, Betty Baker on November 4, Shirley Horn on November 20, and David McCune sometime in the week of November 24.

Price, Meyer, and Baker had signed cards which were shown to Kneisley on March 8. Price declined the offer of recall made to her on October 29. Baker and Meyer were transferred to the third shift shortly after March 8, as discussed herein. Horn was discharged on April 8, as I find herein, in violation of Section 8(a)(3). Neither McCune nor Rike had signed authorization cards shown to Kneisley on March 8, and neither was transferred to the third shift.

Baker testified that she had been employed on the first shift before the March 8 settlement conference. Upon her return from the conference, she was confronted by Donna Lovejoy who informed her that Kneisley had left word for her to clock out and go home when she returned. This amounted to a loss time of one-half hour. On March 15, Baker was called to Michael Kneisley's office. Kneisley told her that he was transferring her to the third shift because Georganna Price and Judy Weber were being taken from the third shift and brought on day so they could learn to scrub and laminate the boards so that Donna Lovejoy could spend more time in the photo department. Baker asked how long she would be on the third shift and Michael refused to say. Lovejoy was already working all of her time in the print room; Georganna Price and Judy Weber were transferred for a short time back to the first shift, but thereafter they were returned to the third shift and Baker remained on the third shift until it was terminated on August 6, 1978. Baker was assigned to the deburrer, a machine she had only worked on a couple of times since she had been employed by Respondent in 1972.

Upon recall Scott Meyer was placed on the first shift where he had been before. Approximately a month after the March 8 settlement meeting, which he attended, he was transferred to the third shift by Michael Kneisley. According to Meyer, Kneisley gave his reason that "they weren't getting production out like they should and he wanted me on the third shift to help out." Meyer stayed on the third shift until he was terminated in June 1978, as discussed *infra*. Michael Kneisley acknowledged that he insisted that Scott Meyer come to the third shift; but he also pointed out that Meyer did not object to working that shift because it was the same as that of his girlfriend who worked at another plant. The only employee who was placed on the third shift who had not signed a union authorization card was Ellen Rue who was recalled pursuant to the settlement agreement in June.

c. *Treatment of other recalled employees*

(1) Assignment of jobs

Georganna Price testified that after the March 8 meeting she was recalled and placed on the third shift. She was assigned the deburring machine, which she had worked before, and the print room which she had not. After about a week she was transferred to the first shift for 3 or 4 weeks during which time she worked in the print room. At the end of that period she was returned to the third shift and to the print room.

Prior to the layoff of October 3, Annie Roberts had worked in the machine shop on the automatic router. She was recalled on March 20 to work the deburrer on the second shift, a machine she had worked on only "a couple of times before, but just half an hour or so at a time." Roberts was continued on the second shift for about a month when she was ordered to transfer to the third shift by Mike McManoway. Upon this transfer, Roberts quit, as discussed *infra*.

When Judy Weber was laid off on October 3, she had been working in the programming department. She was recalled on March 13 to the third shift and was assigned to the print room where she had never worked before. After a week she was returned to the first shift where she also worked in the print room. After about a month she was sent back to the third shift. According to Weber's credible testimony, she was told by Lovejoy[28] that the reason for the transfer was that "they were moving things around and using different paper and

[27] Both shifts had half-hour lunch periods.

[28] By this time, Lovejoy was an admitted supervisor.

things like this and they wanted to put us back on the third shift."

Other employees who were placed on the third shift were also placed on jobs they had not performed before. Although she had not worked there before, Morris was assigned to the gold room when she was recalled in June. Delmar Lawson had worked in plating, as a leadman, but upon recall he was put in the deburring section, on a job he had not performed before, and not as a leadman. Marlene Victor had worked in the print room before the layoff, but she was recalled to the third shift to work on the etcher. Jack Harleman previously worked on the shearing machine, but he was recalled to the third shift to work in plating. Before the layoff Gary Flory was in shearing and sharpening drills in the machine shop, but was recalled to the third shift to work on the plating line, a job he had done just once before in the 5 years he had worked there. Idella Stukins before the layoff worked on the deburring machine, but upon recall she was assigned to the Gyrex machine which she had not operated before. Employee Harry Jordon's testimony about his assignment upon return to a "sander" (apparently an etcher) is too confused and conclusionary to rely upon.

Michael Kneisley testified that the employees were placed where they were needed and, except in general terms which I discredit, did not contend that any of them had prior experience in the jobs to which they were assigned.

Former Supervisor Virginia Myers testified that Cheryl Brummerstedt told her, regarding the employees being recalled pursuant to the settlement agreement, that "they would be brought back and they'd have to be put on jobs probably that they didn't know how to do, and if they couldn't do it, they wouldn't be able to keep them."

(2) New applications and other changes

It is undisputed that all the recalled employees were required to complete new application forms. Also each employee was told he would have to complete a math test which he had not theretofore taken. One older employee, Harry Jordon, flatly refused to take the math test and no action was taken against him. Nor is there any contention that any of the recalled employees' terms and conditions of employment was changed because of the results of the math test. Kneisley, without dispute, testified that, even though the applications were mandatory, no employee's seniority date or other benefit was changed thereby.

Stools which had been about the area in the past were taken away from the employees on the third shift, and the only stools remaining in the production area were marked "supervisor." The supervisors who testified on behalf of Respondent on this issue did not dispute this fact; they just stated that stools were not necessary in most of the production processes or, incredibly, that they presented a danger (on the third shift). It is further undisputed that more "no smoking" signs were placed about the area than were in the production area theretofore.

As noted, several of the employees recalled pursuant to the settlement agreement were, for a time, placed on the first shift. Employee Nelda Morris worked on the first shift for 2 weeks during which time she was told by Supervisor Jennie Crawley that she was to eat lunch from 12:30 to 1 p.m. whereas the other employees ate lunch from 12 to 12:30. Employees Georganna Price and Judy Weber were told by Donna Lovejoy that they were to eat their lunch at 12 p.m., although others regularly ate theirs at 11:30.[29]

Brummerstedt testified that, when she and Dan Kneisley were advised as to how to handle returning employees, their then attorney told them to keep records on the employees, and that after receiving this advice she and Dan Kneisley decided "we should keep a record of what happened, what took place, and like if anything was scrapped or any discipline had to be issued, we would document it and place it in their files so that it would be on the record." Daniel Kneisley conceded that he told Michael Kneisley and Brummerstedt to write up the returning employees for any infractions of rules and scrap, although he further conceded that never before had employees been issued written warnings for scrap. Kneisley pointed out that warnings theretofore had been oral, and the only change was to make them verbal "so that both sides could understand."[30] After being asked specifically about several warning notices that were given pursuant to this newly instituted program, Daniel Kneisley was asked on cross-examination:

> Q. Now, all these entries in Marlene Victor's file were made pursuant to your outstanding instructions through your supervisors to document problems with employees on the third shift, correct?
>
> A. To let them be completely aware. Put it in writing; if they don't understand you orally, then they should understand the written.

Therefore, there is no denial that this warning program[31] was instituted specifically for the employees on the third shift and, as noted above, the only production employees placed on the third shift were those who had signed cards for the Union.

Employee Betty Baker testified that she was told upon recall to the third shift that she could go to the restroom only on breaktime whereas before the employees could use the restroom any time they wanted to. Baker did not say specifically who so instructed her, but she testified that Cynthia Leffew was her immediate supervisor on the third shift. Employee Weber testified regarding restroom privileges on the third shift. "You had a certain time to go." She did not testify as to who had given her any such instruction, but she testified generally that

[29] Neither Jennie Crawley nor Donna Lovejoy testified.

[30] Kneisley, at another point, described the warning notice system as a "communication link" devised by Crawley for the employees returning pursuant to the settlement agreement.

[31] One specific notice made the subject of the complaint was issued to Gary Flory, who testified that after being recalled to the third shift he was told by Brummerstedt to sign a paper stating that, if he scrapped out any more boards, "I discharged myself." Flory refused to sign the paper until he was given a copy of it to show the Union's attorney. According to Flory, Brummerstedt replied that he could not take it out of the plant, and "she said it didn't make any difference whether I signed it or not, it was going into my files." A document to this effect, dated May 30, was produced from Flory's files.

Brummerstedt was her supervisor. Leffew credibly denied giving such instructions. Brummerstedt was not asked about the matter by either the General Counsel or Respondent, but I find the generalized testimony of Weber and Baker insufficient for finding that they were instructed by agents of Respondent that they had fewer restroom privileges than existed theretofore. Certainly the testimony is insufficient to prove that Respondent generally discriminated against the third-shift employees regarding restroom privileges.

(3) Reduction of hours of recalled employees

(a) *Shorter workweeks and less overtime*

The General Counsel contends that the employees who were recalled pursuant to the settlement agreement were afforded fewer hours than they otherwise would have received. All employees who were questioned on the matter and Brummerstedt credibly testified that before the events of this case employees were allowed to do cleaning or other type work if they ran out of work on their shift, but they were not sent home early. However, after the settlement agreement, the third-shift employees were sent home early whenever work was slack. This testimony is undenied.

Received in evidence were the hours worked by employees showing that between the weeks ending March 23 and June 22, even if as little as two-tenths of an hour remained, employees who had signed union authorization cards were sent home or "docked." For example, card-signing employees were credited with the following hours in the week specified; the week ending May 4, Stukins received 39.8 hours; the week ending May 11, Jordan received 39.5, Teaford 39.8, Salyer 39.5, Stukins 39.0; the week ending May 18, Weber received 39.8 and Stukins 39.6; the week ending May 23, Horn received 39.9 hours; and in the week ending April 26, Victor received 39.5 and Stukins 39.5. Respondent's records for this same period of time reflect that the only employee who had not signed a union card who was docked a period of less than an hour in a week during which the third shift was in existence was Magness (who received 39.7 hours for the week ending March 23) and Virginia Connally (who received 39.5 hours the week of June 15).

By the week ending May 18, the only employees left on the first shift were those who had not signed cards which authorized the Union as their collective-bargaining representative and which Kneisley examined on March 8. Thereafter, until the third shift was abolished in August, the only known card-signing employee who was placed in the first shift and not transferred to the third was Nelda Morris who worked for 2 weeks and 2 days ending June 22 when she quit. Conversely, only those whose cards were examined on March 8 were placed on the third shift. Excluding Morris from the analysis, a clear pattern[32] is established by Respondent's records.[33] In the week ending May 18, Respondent employed 9 employees on the third shift and 12 on the first. Each of the 12 first-shift employees worked 40 hours that week, and 8 of them worked overtime; of the 9 third-shift employees employed that week, 6 worked 40 hours and 3 worked overtime. In the week ending May 25, 11 of the 12 first-shift employees worked 40 hours, and 9 of those worked overtime; of the 7 third-shift employees employed that week, none worked 40 hours and none worked overtime. In the week ending June 1, 11 of the 11 first-shift employees worked 40 hours and 7 of those worked overtime; of the 10 third-shift employees employed that week, 1, Scott Meyer, worked 40 hours, and only he worked overtime (two-tenths of an hour). In the week ending June 8, 11 of the 13 first-shift employees worked 40 hours, and 8 of those received overtime; of the 9 third-shift employees employed that week, none worked 40 hours or received overtime. In the week ending June 15, of the 15 first-shift employees 14 worked 40 hours, and 8 of those received overtime; of the 5[34] third-shift employees employed that week, none worked 40 hours or received overtime. In the week ending June 22, of the 15 first-shift employees, 14 worked a full 40-hour week and 8 of those worked overtime; of the 8 third-shift employees employed that week, 4 received a full 40-hour week, but none of those worked overtime.

(b) *Layoffs of May 11, 1979*

Finally, in regard to alleged reduction of hours of union sympathizers, the complaint alleges that on or about May 11, 1979, Respondent laid off employees Betty Baker and Harold Teaford for a period of 2 days. Teaford did not testify. Baker testified that, on that date, she was told by then print room supervisor, Leffew, that she was being laid off for 2 days because of changes that were being made for EPA. Leffew testified that, at the time, the only personnel in the print room were herself, Robbin Scroggins, Pat Fenton, and Baker. According to timecards received in evidence, Scroggins was laid off at the same time for the same period. (The complaint does not mention Scroggins.) Leffew acknowledged that Baker was the senior employee but Fenton was retained because she was a salaried "management trainee." Leffew did not testify what changes, EPA or otherwise, were being made which precipitated the layoff. Just who Teaford's supervisor was and what he was told is not in evidence. His timecard for the period was placed in evidence through Kneisley. The card is marked "off due to EPA work," but Kneisley did not state who made the mark or to what "EPA work" is being referred.

9. Alleged constructive discharges

a. *Jack Harleman*

Jack Harleman testified that upon his recall he was required to take a math test and fill out the new application, then he was assigned to the third shift under the su-

[32] Attached to General Counsel's brief is a chart which is helpful in analyzing the records.

[33] My summary, which is derived from Resp. Exhs. 44 and 53, omits Michael Scott who was employed as a part-time employee on the day shift. Doris Jean Jamison was also hired as a part-time employee on the first shift. She did not become a full-time employee until the week of June 15 (apparently the week school was out); therefore, she is not counted until that week.

[34] I exclude Scott Meyer who worked only .9 hours before quitting at the start of that week.

pervision of Michael Kneisley. He worked on the third shift 2 days but did not report on the third or thereafter. When asked why he did not return to work, Harleman testified that he knew he would not get along with Michael Kneisley and he did not like the third shift. Harleman acknowledged that he did not complain about the math test or the applications or being assigned to the third shift; he did not give any supervisor the reason for his quitting; and he did not ask for a transfer to another shift.

b. *Anne Roberts*

Anne Roberts was recalled about March 20. Like the others, she had to complete the math test and a new application. As noted above, she worked for about a month on the second shift when she was transferred to the third. As testified by Roberts, she was called into Brummerstedt's office the night she was to report to the third shift and told Brummerstedt that she had quit but gave no reason. Roberts credibly testified that Kneisley replied only "good" and hung up.

c. *Virginia Salyers*

On the record the General Counsel represented that Virginia Salyers was suffering from a terminal illness at the time of the hearing and was incapable of appearing in court; her investigatory affidavits were offered as testimony. Respondent did not dispute the General Counsel's representation that Salyers was incapable of appearing, but objected to the admissibility of the affidavits on the ground that it was denied the opportunity to confront the witness. On the basis of the authority of *Limpco Mfg. Inc., and/or Cast Products, Inc.*, 225 NLRB 987 (1976), which holds that, under such circumstances, an administrative law judge should receive such affidavits and give them what credence he finds appropriate, I received the affidavits over objection.

One affidavit of Salyers states that she was recalled pursuant to the settlement agreement but she was not permitted to work a full 40-hour week and that "I averaged only 31 hours a week." Salyers states that it was for this reason that she resigned on May 26 (a Friday, the first day of a pay period). The records introduced by Respondent do not bear out Salyers' claim of reduced hours. The records reflect that Salyers received 40 hours for the weeks ending March 30, April 6, 13, 20, and 27, and May 4 and 18. She received 32 hours for the week ending March 23 (the first week on recall), 39.5 hours for the week ending May 11, and 33 hours for the week ending May 25; she worked 23.3 hours the week she quit. It would hardly be logical to include Salyers' first or last week of employment in figuring her average hours worked. There is no evidence of what day of the week she was recalled, and the hours worked her last week were apparently determined by her. Also there is no basis for determining what caused the half-hour loss in the week ending May 11. Therefore, indulging in every possible presumption the General Counsel could advance, the week Salyers was "shorted" (according to the records which the General Counsel did not question), was the week of May 25. Moreover, Salyers' affidavits do not reflect that she told any supervisor that she was resigning because of the reduced hours on that, or any other, week.

d. *Scott Meyer*

Scott Meyer was recalled on November 3 and placed on the first shift. He continued working that shift until about a month after the March 8 settlement agreement when he was transferred to the third shift. On or about June 6, Meyer became nauseated at work and reported this to Brummerstedt and asked permission to leave work early. Brummerstedt gave him the permission and he left the plant to go home. At some time between 4 and 7 a.m., Meyer telephoned Brummerstedt and asked if it was possible that new chemicals or other substances were being used in the plant which could make him dizzy. Brummerstedt replied negatively. Meyer further testified that at 7 a.m. Brummerstedt called his home and told him that he would have to have a doctor's excuse to return to work. Meyer further testified that by that point he was feeling all right, but did not report this to Kneisley. Instead he responded, "I won't need one, Cheryl, because I quit." He did not expressly state a reason.

Meyer credibly testified that he never before had been required to have a doctor's excuse to return from such a brief absence.

e. *Ellen Rue*

Ellen Rue was recalled on or about June 6. While she was previously employed on the first shift, she was immediately placed on third under the supervision of Brummerstedt. Rue worked 1 night and asked Brummerstedt if she could be transferred to the first shift as her husband did not want her working the third shift. Brummerstedt responded negatively stating that Nelda Morris was the last person who would be placed on the first shift. Upon such denial Rue announced that she quit. According to Rue's credible testimony, Brummerstedt replied, "I don't blame you."

f. *Georganna Price*

Georganna Price was recalled in March 1978. Price credibly testified that she was assigned a job that she had not done before, required to eat lunch at different times from other employees during a 3-to 4-week period in which she was temporarily assigned to work the first shift; was affected by the removal of stools from the work area; observed new no-smoking signs in the area (although she does not testify that she was affected thereby); was sent home early on a number of occasions without completing her shift, although there was work to be done; was given contradictory instructions from Brummerstedt and was once ridiculed by Brummerstedt because of her inability to perform one assignment which she had not done before. Price resigned on June 16, giving as her only reason that she wanted to stay home. Although Price testified that she resigned because of harassment, there is no testimony that she ever complained about harassment or the assignment to the third shift or any of the conditions on that shift.

g. *Judith Weber*

Judith Weber was recalled on March 13 and assigned to the third shift under Brummerstedt in the print room. After a week she was assigned to the first shift and remained in the print room, but was given separate lunch periods as noted above. After a month Weber was also reassigned to the third shift along with Georganna Price. Weber further testified that she was watched more closely by Brummerstedt (and, as noted above, in testimony which I have found incompetent to prove the fact, she testified that restroom privileges were curtailed). Weber did credibly testify that stools were removed from her work area. Weber testified that during the last several weeks of her employment she was interrogated by Brummerstedt on the subject of unions, Brummerstedt asking her when and where the Union had its meetings and how Weber felt about the Union. Weber was further told by Brummerstedt that Daniel Kneisley would never have a union in the plant and he would do anything to prevent it. This testimony regarding statements of Brummerstedt was not denied.[35]

Weber testified that she quit because of the working conditions to which she was subjected on the third shift. However, she further testified that in resigning she told Brummerstedt "that I was quitting and going on vacation." Weber also stated in a resignation slip placed in her file (and introduced in evidence) that the reason she was quitting was to go on vacation.

10. Discharges

a. *Elmer King*

When Steven Stump was hired, November 7, 1977, he was placed in charge of Respondent's maintenance crew which then consisted of employees Elmer King, Larry Magness, and Gordon McCray. King had been employed for 6 years. Stump testified that he was given the assignment of making all the modifications in the plant, with only occasional assistance from outside contractors, using these three individuals. Stump testified, without contradiction, that the three on the maintenance crew could perform little or no work beyond routine janitorial work. With regard to King specifically, as well as being completely unskilled, Stump credibly testified that the employee wasted time being overly talkative, would shortcut his cleaning jobs on expensive machinery which caused damage to the machines, and King would hide things like screwdrivers where no other employee could find them. Further, Stump was continually annoyed by King's inability to go and fetch objects such as certain size sockets or certain amperage fuses; King would repeatedly bring back a group of objects and Stump would have to select from among them.

None of this testimony is denied; King could testify to no compliment he had received in the 2 or 3 years prior to his discharge.

On March 8, King appeared with other employees at the Board hearing and settlement conference; his authorization card, along with others, was examined by Kneisley.

King testified that when he asked for time off to go to the hearing he simply told Stump that he wanted to go to Dayton and Stump agreed. Stump testified that King stated only that he wanted a couple of hours off to get his car fixed and he replied, "That's no problem, punch out and when you come back punch the clock again."

King testified that upon his return to the plant the next day he was confronted and excoriated by Stump, although he could not remember anything that Stump said other than, "I thought you was going to get your car?" King further testified that Stump "kept on after me and kept on after me days and days after that . . . because I didn't tell him why I was going to Dayton for." King was not asked what he meant by this last statement and there is no credible evidence that the matter was mentioned to King after the date of his return from the hearing. Stump testified that he learned that King had been to the hearing and upon King's return to the plant he asked King why he had lied about going to get his car fixed. Stump testified that King responded that he thought he would be in trouble because he had gotten a subpena. I believe Stump, that King told him he would be absent because he was getting his car repaired. However, I do not believe Stump's testimony that he believed King. Presumably Stump knew there was a Board hearing that date and, although King was not a known card signer at the time, he was one of the few employees left from the layoffs and Stump could not have believed that the absence was coincidental. But whether King just told Stump that he was going to Dayton or he told him that he was getting his car repaired is essentially immaterial. Stump became infuriated when he found out that King was actually going to the NLRB proceeding and, as Stump conceded on cross-examination, although it was 2 or 3 weeks before he decided to discharge King, that was "locked into my mind that that [sic] one of the things I didn't like." Stump testified that what it was that he did not like was being lied to by King about his whereabouts, not his appearance at a Board hearing.

I do not believe Stump's denial that he harbored animus toward King's appearance at the Board hearing and settlement conference. There is no contention that King's absence caused any substantial disruption in the janitorial work, which Stump testified was all that King was qualified to do anyway. The abstract veracity of an employee who is painted as a bumbling incompetent is unlikely to be a material factor in an employment relationship, especially where the innocuous misrepresentation is in a context unlikely to be believed, was not relied upon, and is about a topic totally unrelated to the work for which the employee is supposed to be employed. It is clear that Stump became and remained angry with King because of his absence on March 8. If, as Stump testified, King explained that he lied because he thought he would get in trouble for responding to a subpena, and Respondent had no intention of punishing King or any other employee for such response, a realistic reaction by Stump would have been pity for the employee's ignorance, not an abiding anger over a childish misrepresentation. I find

[35] The General Counsel does not allege that this testimony constitutes an independent violation of the Act.

that Stump's anger with King was engendered, at least in part, by the fact that he went to the Board hearing, an unquestionably protected activity.

On March 28, Stump fired King, McCray, and Magness. The reason given for the three discharges was simple incompetence to perform the work which Respondent was required to do to effectuate the EPA program.

After King, Magness, and McCray were discharged, two new employees were hired for maintenance and employee Michael Rike was transferred from production to the maintenance crew. While none of the three new members of the maintenance crew had any particular qualification, Stump insisted that they got the job done better than the old crew and this testimony is unrebutted.

The General Counsel makes no contention that Respondent, in any way, violated the Act by the discharges of Magness and McCray.

b. *Shirley Horn*

Shirley Horn was among the employees laid off on October 3. On November 21, she was recalled and, according to her unrebutted testimony, was given a full 40-hour week plus several hours overtime per week working in the gold room. She attended the March 8 Board hearing. She testified that upon her return, on a few occasions she was told by her supervisor, Wilbur Crawley, to eat lunch at a different period from the other employees. In so doing, she was forced to eat lunch by herself. Horn testified that, on April 13, she was called to an office by Supervisor Crawley and told that she was being laid off for lack of work. She asked Crawley if she would get unemployment compensation and he replied, according to Horn, "Well, if they call me and check with me, I'd have to say you were fired, but Dan [Kneisley] won't fight you." Horn testified that 2 weeks before her discharge she had gotten an evaluation from Crawley in which he had rated her as a good dependable worker and had given her a raise. I credit the foregoing testimony of Horn.

Crawley acknowledged that Horn was:

> A good hard worker. She tried to do what she was told to do. She never give no hassle, she did have a cripple hand which limited her physically as to what she could do, but she done real good with what she had to work with.

When asked why she was terminated, Crawley responded that, "We were running out of work, didn't have the work to keep her going, that pure and simple. Our workload had dropped off to practically nothing in the gold room."

While Crawley testified emphatically that Horn was a good worker and was "laid off" only because of lack of work, there was received in evidence a written notation from Daniel Kneisley to the attorney of record stating the reason for the basis of Shirley Horn's termination was "Discharged. Just could not do job." Horn was replaced in the gold room by Nelda Morris who was recalled during the week of June 1, 1978. Crawley could assert no reason for not recalling Horn during that week, nor was any reason given why Horn was not recalled when Morris resigned during the week ending June 15, 1978. No other employee was discharged because of a purported lack of work.

As noted above, Horn was the only employee whose authorization card was shown to Kneisley who was not transferred or assigned to the third shift.

c. *Delmar Lawson*

Delmar Lawson was discharged by Respondent on April 21. He had been recalled on March 20 pursuant to the March 8 settlement agreement and placed on the third shift under the supervision of Mike Kneisley and Cheryl Brummerstedt.

Lawson testified, that at the beginning of the shift on April 21, he was called to the office by Michael Kneisley who told him that he was being discharged for excessive absenteeism. Lawson was forced to sign a "resignation" of which Kneisley would not give him a copy. Under direct examination, Lawson admitted to being absent a total of 5 days in the month after he was recalled. He testified that 1 day was for personal reasons; 3 days were "under doctor's orders to accompany my wife because of an automobile accident"; and the final day was required for him to travel out of town because his mother's sister had been involved in an automobile accident. Lawson testified that, at an unspecified period of time before each absence, he called the plant to either Michael Kneisley or Brummerstedt and they said it would be all right for him to take the day off. Lawson testified, without support, that Marlene Victor and Idella Stukins had greater absentee records than he at the time of his discharge.

Respondent's records reflect that, on March 26, Lawson reported to Brummerstedt that he would be absent because his wife was involved in an automobile accident. The absentee report for that date does not reflect whether it was considered excused or unexcused. Michael Kneisley testified that, on March 28, Lawson called in to report at 10:30 p.m., a half-hour before his shift was to start, and told Supervisor Mike McManoway that he would be absent for 2 days. Upon appearing at the plant, Lawson filled out an "absentee report" checking the blank for "sickness in the family" and wrote that the doctor asked for his presence with his wife after an accident. Michael Kneisley credibly testified that he gave Lawson a verbal warning for reporting only to McManoway rather than himself and recorded this fact on the absentee report. Also on the absentee report is checked in apparently the same pen used by Kneisley, the blank marked "unexcused absence." Kneisley testified that, on April 9, Lawson called in at 11:40 to state that he would be late, although instructions are for employees to call in anticipated tardiness no later than 11:10 p.m., and that on that date Lawson did not report until midnight.

Michael Kneisley further testified that Lawson, on April 10, called in at 11:40 p.m. to report that he would be late and he suspended Lawson for a period of 2 days, or until April 16. On April 19, Lawson called in again to report that he would be absent because of another accident in the family and that he would be back to work on

April 20. On April 20, Lawson did not report to work. According to Kneisley, a person identifying herself as Lawson's mother called to report that he was still out of town and did not know when he would be back. Further, according to Kneisley, because of the previous tardiness and absences, and because Lawson's absences and tardiness interfered with production schedules, and for these reasons alone, he discharged Lawson on April 21.

Michael Kneisley testified that there was no set number of absences required for discipline of an employee, but that he considered Lawson's absences excessive.

d. *Marlene Victor*

Marlene Victor had been employed by Respondent for about 6-1/2 years. She was one of the initial employee organizers of the Union and was one of those who contacted an attorney for advice on how the employees could organize into a labor organization.

Victor was employed in the printroom before the layoff of October 2. When Victor was recalled during the week of March 24, she was placed under the supervision of Michael Kneisley, Brummerstedt, and Michael McManoway and assigned to work on the etcher.[36] She worked the etcher for 3 weeks when she broke her leg and then she was off for a period of about 6 weeks. She returned to work during the week ending June 1 and worked that week, the following week, and the week ending June 22.[37] She testified that during the period of her recall she was once told by Michael Kneisley that she was taking too long to go to the restroom and that he was going to write her up for doing so. Michael Kneisley did not deny this remark, but further credibly testified that he had to admonish Victor on at least one occasion to return to her work area after she was talking to another employee.

Victor's immediate supervisor during the last 3 weeks of the employment was John Conley. Victor testified that, on June 22, she was assigned to run some boards through the etcher. Before her lunch period that day, she placed some boards in baths and when she returned Conley instructed her to run the boards through an etcher again. According to Victor, she ran the boards "completely through the etcher." Just what happened to the boards is not disclosed by the record; Victor simply testified, "Well, they scrapped out." She called Conley to her work area and he asked what she had done. Victor replied that she had run them through again and Conley said, "Not through the front of the etcher." Victor replied that she had done that because she thought that was what Conley wanted. Victor testified that Conley took her to the office of Wilbur Crawley. In Crawley's presence Conley said that she knew what she had done and she replied, "Yes, I scrapped out eight boards." She asked if she were fired and Conley replied that she was.

Conley was not called to testify and no reason was advanced by Respondent for not doing so. Crawley testified that, during the evening,[38] Conley brought some boards to his office and asked if he thought the job had been damaged intentionally and Crawley replied that he did. Conley told Crawley that he intended to fire Marlene Victor because of the scrapping of the 8 to 10 boards. Crawley told Conley to call Victor to the office to handle the discharge which Conley did.[39] Crawley, in testifying about what happened to the scrapped order, credibly testified, "That should not have been as such, one or two boards, but not the whole order, not the whole order. You just can't work that many boards without knowing it." Although Victor testified that she told Conley she thought she wanted her to feed the boards into the etcher as she had done, she did not testify that she did, in fact, believe that she was supposed to feed the machine in the manner she did, and she appeared to have been carefully choosing her words in testifying on the point. Also, I detected an air of feigned ignorance in her remark that she thought Conley wanted her to feed the boards through the front of the etcher. Victor did not testify that the order involved any new or unusual procedure and did testify that she never before had trouble with operating the etcher and "if we had scrap I never knew about them."

11. Bargaining after settlement agreement

Pursuant to the settlement agreement of March 8, six bargaining sessions were conducted. The Union was represented by Attorney Hole, who was usually assisted by employees Morris, Flory, and Lawson. Respondent was represented by Attorney Robert J. Brown who was always assisted by Daniel Kneisley. There are several matters of dispute about what happened at these sessions. There is even dispute about when they began and when proposals were exchanged. On matters involving dates of the meeting I found the testimony of Brown the more credible, and I rely on his testimony of when meetings were held. Hole and Brown agreed to meet for the first session on May 8. Hole and Lawson testified that it was at this first meeting that the Union presented its first proposal. Brown testified that, although the Union presented a list of demands in exhaustive detail, consuming about 2 hours, no written proposal was submitted by the Union until June 29. I credit Hole and Lawson. It is inconceivable that an initial bargaining session would have taken 2

[36] This was a machine to which she had not been assigned before and she testified that she was given only about 5 minutes' instruction on the etcher by Michael Kneisley. This, I find, is an exaggeration but it is clear that she got little training.

[37] Victor was one of the employees who testified that the stools were removed from the third-shift employees. She further testified, without contradiction, that she brought her own stool to work thereafter and was instructed by Brummerstedt to take it home.

[38] Crawley testified that at one point during the evening he heard Victor blurt out to Conley that she knew more about the etcher than he did. Victor denied making such a remark. I found Crawley, not Victor, credible on the point, but without the testimony of Conley to supply the context of the remark, I draw no conclusion therefrom.

[39] Crawley testified that after the discharge he escorted Victor from the plant and, as he was doing so, Victor stated that Crawley should not be keeping his baby at the plant as he was then doing. When Crawley asked if Victor were threatening the baby, Victor said that she was not. Even as Crawley described it, this was not a threat of physical harm to the infant as Crawley seemed to imply; moreover, it is undisputed it occurred after the discharge had been effectuated. Certainly, Victor's ambiguous statement did not disqualify her from further employment, assuming that a violation in her discharge is found.

hours if all the Union was doing was orally reciting a listing of the categories of things they wanted changed. Moreover, the proposal submitted by the Union begins: "This agreement, made and entered into this—day of May, 1978 . . . ." This reference to May 1978 is consistent with Hole's credible testimony that the Union was desirous of reaching an agreement quickly. Also, it is inherently illogical that such proposal would have been submitted in June, and, if it were, there was no evidence that Brown questioned it.

On June 23, the parties met for the second time. Respondent advanced its initial proposal, the most salient aspects of which are that it contained no economic provisions, a 90-day probationary period (whereas there then existed only a 30-day probationary period), and a grievance and arbitration clause which is binding but requires the arbitrator to "within 30 consecutive days from the arbitration hearing, render his decision." The parties went over the proposal for about 2 hours, and it is clear that Hole objected to the 30-day limitation on the arbitrator. Respondent did not agree to eliminate or modify this provision throughout the negotiations.

At the meeting of June 29, the third, the parties went over Respondent's original proposal again, Brown giving explanation of its terms. Brown also testified that the parties also went over the Union's original proposals. Hole testified that, after Respondent's original proposal was presented, Brown absolutely refused to consider any of the Union's original proposals. Except for certain provisions such as checkoff, arbitration, wages and insurance, Hole specified no provisions of the Union's proposals which it brought up and Brown refused to discuss. I find Hole's blanket conclusionary testimony that Responsent refused to consider the Union's original proposals insufficient to prove the fact.

The fourth meeting was held on July 7. As part of his general, conclusionary testimony, Hole lumped this meeting with others, and Brown's is not much better. It suffices to say that no agreements were reached.

The fifth meeting was conducted on July 21. Brown testified that by the end of this meeting the parties had agreed to Respondent's proposals on a preamble, "intent and purpose clause," recognitional clause, management rights, no strike, bumping in layoff situations, funeral leave and jury duty, duration of leaves of absences, and nondiscrimination. The parties were apart on probationary periods, shift starting times, overtime pay, grievance and arbitration, wages, and insurance.

The final meeting was August 20.[40] At this, the sixth meeting, according to Brown, wages and insurance were the principal topics of discussion. According to Brown the Union wanted insurance "picked up as part of the economic package. We agreed to that." Brown also testified that he explained to the Union that because of "our EPA problems and also our business problems," Respondent could afford no wage increases at the time, but Respondent would agree to a wage reopener, and the no-strike clause would not be effective until wages were agreed upon, after 3 months.

[40] There is no credible testimony which would place the responsibility for the delay on Respondent.

On September 1, Brown sent Hole a comprehensive proposal embodying Respondent's previously stated positions and the following modifications: Probationary period proposal was reduced from 90 to 60 days: discharges must be "for cause" before they would terminate seniority; senior employees need not have held a job permanently before they could bump into it, as originally proposed by Respondent; reporting pay upon machinery breakdowns was increased from zero to 2 hours' pay, while the Union was requesting 4 hours. Finally, the proposal included no wage increases but did include the 3-month wage reopener mentioned above. The proposal was transmitted by letter which invited Hole to contact Brown if there were any question about it.

In the Union's initial proposal, the following term is contained: "All employees covered by this agreement shall receive a — cent (—¢) an hour increase on June 1, 1978." Hole testified that the blanks were never filled because, from the start of negotiations, Brown stated: "We will not negotiate anything that's financial." Further according to Hole, at the second meeting he made an insurance proposal and Brown replied, "That's financial. We're not discussing that." Lawson testified, "On numerous occasions the Union suggested talking about wages, but the company refused to talk about them at that time, giving us an explanation that we have to have a skeletal setup for our agreement, being that we are going to get the structure of an agreement down before we'll talk about the wage." Brown testified that, at the first meeting, he told the Union:

> . . . we intended to submit a proposal to them as generally the standing practice in most negotiations that I deal in . . . we proposed at first that we talk about the language matters and we try to get those out of the way and get them solved and then get into talking about economic considerations. He told them that we weren't precluding one versus the other but it probably would be easier to set forth the basis of the contract before we got down into talking economics.

Hole credibly testified that there was no discussion of the 3-month wage reopener described above or insurance before the September 1 proposal by Brown. From the credible testimony of Hole and Lawson, as well as the corroborative fact that ultimately no financial changes were offered by Respondent, it is clear that economic items were precluded from discussion by Brown until his comprehensive proposal of September 1, his protestation that it was just a suggestion because he thought it would simply be "easier" to discuss economics first notwithstanding.

Hole testified that, at all bargaining sessions, Brown refused to consider a checkoff proposal stating only that there just would be none. Brown denied rejecting checkoff out of hand. As a reason for rejecting it, according to Brown, he told the Union that "with the bookkeeping facilities that we had that we didn't feel that the additional administrative expense of having a checkoff was such that we could afford it." As reflected by Respondent's Exhibit 53, it, at the time, maintained a sophisticat-

ed computerized payroll which had at least three columns[41] where such deductions could have been entered.

As noted, the Union proposed continuation of the 30-day probationary period. Brown countered with a proposal for 90 which he ultimately reduced to 60. No explanation of why Respondent needed an enhanced probationary period was offered at the hearing.

Finally, the General Counsel contends that Respondent refused to negotiate an agreement which embodied any continuation of smoking rights. The only evidence on this point is that the Union's original proposal included a provision which would give seemingly limitless authority to ban smoking in the work area, and Respondent's proposal made no mention of "smoking rights." The effect of either position is the same, especially in view of the broad management-rights clause to which the Union quickly agreed; management would designate smoking areas. It is undisputed that, in the production processes described above, volatile chemicals are used at different stages, and some chemicals are substituted for others from time to time.

In addition to contract items, Brown testified that, at one of the meetings, which he believed to have been the July 21 meeting, the Union questioned the move of the automatic router to one of the corporations newly formed by Kneisley. Brown testified that he told the Union that "that piece of equipment was not something that was being operated by bargaining unit people. It was being run by technical people who were excluded from the agreement . . . . The reason we're moving it from that operation was that . . . Dan had started a new type of business in the area. It would not affect anybody in the bargaining unit. We explained that to them that it would not affect anyone." As noted above, footnote 23, "technical" employees were excluded from the unit described in the March 8 settlement agreement. No basis for classifying the employees as "technical" was advanced at the hearing and, from this record, it was not questioned in bargaining either.

12. Board Order setting aside settlement agreement

The several charges filed after March 8 relate to Respondent's post-settlement conduct. On July 31, 1978, complaint issued in Case 9-CA-12652, and on September 13, 1978, complaint issued in Cases 9-CA-12779 and 9-CA-12779-2 which were consolidated that date with the July 31 complaint. These complaints, as consolidated, allege as violations the various matters discussed above which occurred after March 8. Because the General Counsel wished to litigate the presettlement conduct discussed above, and because of the obvious problem posed by the limitations provision of Section 10(b) of the Act, the General Counsel, on November 30, 1978, moved to the administrative law judge originally assigned to the matter that he withdraw his approval of the settlement agreement and his dismissal of the charge and complaint and that he reinstate the complaint in Case 9-CA-11799 and consolidate it with the then outstanding complaints for further proceedings. As a basis for the motion, the General Counsel stated that Respondent had failed to comply with the terms of the oral settlement by certain of the conduct mentioned above. Respondent opposed the motion stating that it had in all respects complied with the settlement agreement. On December 19, the administrative law judge then assigned denied the motion of the General Counsel. On January 2, 1979, the General Counsel filed with the Board a "Request to Board for Special Permission to Appeal Ruling on Motion by Administrative Law Judge" and further filed, on February 26, 1979, a brief in support of said request, arguing additionally that the complaint should be reinstated because Respondent had paid only $8,000 of the $20,000 to the Union as provided by the agreement. On March 8, 1979, by telegraphic order, the Board issued a telegraphic order stating:

> Request for special permission to appeal from the Administrative Law Judge's ruling denying motion to withdraw dismissal of Complaint is hereby granted and the Administrative Law Judge's ruling is reversed.

It is undisputed that, until the date of the hearing herein, Respondent had not tendered the balance of the moneys called for by the agreement. Respondent replies that its failure is excused because there was a prior breach by the Union in its failure to submit waivers of reinstatement from all the employees who were not recalled, or reinstated, pursuant to the settlement agreement. Respondent further denies that its conduct, after March 8, violated the settlement agreement or the Act.

IV. ANALYSIS AND CONCLUDING FINDINGS[42]

A. *The "Layoffs"*

Respondent contends that the layoffs of September 26 and October 3 were mandated solely by business conditions, and Kneisley testified that the employees had been forewarned of the layoffs by an April 20, 1977, announcement of changes in supervision, the May 20, 1977, announcement of a "hiring freeze," appeals to reduce scrap, and the general knowledge that Respondent was having problems with the Ohio EPA. However, hirings continued despite the announced freeze and neither it, nor the appeals for better proficiency, nor awareness of the EPA problems contained either conditional or categorical warnings that any employee's tenure of employment was in jeopardy. Kneisley described dark days in the history of the business precipitated by the specter of

[41] Columns "G," "H," and "MISCELLANEOUS AMOUNTS & CODE" are unused.

[42] Not mentioned before, because it has nothing to do with anything else that happened in the case, is the fact that in a booklet of "Plant Rules" which has been in effect at Respondent's plant since 1974 is a rule prohibiting: "Posting, publishing and or distributing written or printed matter of any description on Company property without written permission from the Company." As amended at hearing, the complaint alleges that this is an overly broad no-distribution rule, since it would include protected union and concerted activities within its sanctions against distributions during nonworking time in nonwork areas. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Although the rule was promulgated before the limitations period of Sec. 10(b) of the Act its maintenance therein constitutes an independent violation of Sec. 8(a)(1) of the Act. *Varo, Inc.*, 172 NLRB 2062 (1968).

the Ohio EPA and financial peril imposed by taxing authorities. Yet, never before the onset of his employees' organizational attempt was he "required" to impose a multiemployee layoff.

The defenses for the layoffs, which Kneisley mostly lumped together in his testimony, are spurious. The employees had to be wrenched away from the work that surrounded them. Respendent posted a notice that the sole reason for the first layoff was "lack of work" when its own records showed approximately a quarter-million-dollar backlog. (The relative size of this backlog is demonstrated by the fact that Kneisley agreed on March 8 to "recall" 14 employees when February's ending balance of orders was only $55,734.56.) Kneisley acknowledged, even insisted, that Respondent was not meeting shipping dates and, according to the testimony of Hall, who overheard Brummerstedt talking to Haworth, he was then making promises of production dates which would be difficult, if not impossible, to meet. The employees were working overtime regularly and were promised more. Knowledge of these factors was assuredly what reduced Smith to tears as she informed Morris and Harleman of their layoffs, caused McNutt to be enigmatic toward Fultz and Davis when informing them of their layoffs, and further caused McNutt to refuse flatly to respond to the direct inquiry by Hine "if I was being laid off because of the Union." That is, neither the September 26 nor the October 3 layoffs were caused by "lack of work," as Smith and McNutt well knew.

At the time of the layoffs, Kneisley did not consider the Ohio EPA to be a serious threat to the operation and, at the time, it was not. Respondent had been accused of noncompliance literally for months by September 1977. The Ohio administrative procedures had not gotten beyond the routine letter-writing stage; closure had not been threatened; and prosecution was problematical. When Smock gave up on the construction in August, no one supervised the project until Stump was hired on November 7. Respondent's letter of March 8, 1977, to the Ohio EPA described the employees assigned to the project as "lacking in proper skills," but Respondent continued with these employees until March 28, 1978, when the three were fired for total incompetence to help with the construction work.

Respondent further blames the layoffs on the scrap problems which its brief describes as "horrendous" but which Drilling Supervisor Smith described as a "little scrap here and there." Whatever its extent,[43] Respondent blames the scrap, and customer rejections, entirely upon the employees. If the performance of the work force had truly been at the nadir state depicted by Respondent, at least some, or all, would have been warned that their livelihoods were in peril. No employee was warned; none was even advised of the amorphous, and incredible, criticisms advanced by the Kneisleys, Crawley, and Mason.

Finally, Kneisley credits the layoffs to a high labor-cost-to-shipped-sales ratio. Kneisley testified that when the ratio exceeds 30 percent "you have a problem some place, a very definite problem." While Kneisley described the problem as solely one of wretched employee performance, it is obvious that at least one factor in Respondent's labor costs was the great amount of overtime it was paying Lawson and the other employees in the month of September. At any rate, although the ratio had exceeded 30 percent many times in the past, according to Respondent's records this time something had to be done or, according to Kneisley, the business would not last long. Just how long Kneisley would have the Board believe the business would have lasted without the layoffs is unclear. At one point he testified that the business "wouldn't have been there another 30 days" and at another that "in a very few months, it was going to be very difficult for K & S to get work because we had many dissatisfied customers." "Dissatisfied" or not, Respondent, even by Kneisley's palpably disingenuous estimates, had customers enough to supply work for at least 30 days' work, and possibly enough for a "few months." Certainly there was enough to let the employees finish the days of their layoffs.

Whatever Respondent's corporate life expectancy was on October 3, Kneisley attempted to fill it without any of the core of personnel involved in the organizational attempt—the production employees. Retained were only the maintenance employees (including King), group leaders (except Lawson), inspectors (who were ultimately excluded from the agreed-upon unit), and supervisors (including Baker who, after she brought informant Price to Kneisley, was promoted even as the employee complement to be supervised was being decimated, and Crawley who remained to operate the gold room although he was totally ignorant of its processes).

Kneisley's testimony about the process of deciding who was to be "laid off" and who was to be retained is plainly incredible. If, as he testified, as much as a month before the layoff he went over lists of employees with supervisors in the processes of selecting on the basis of merit, surely one of them would have been called to testify by Respondent, or at least named by Kneisley. According to this record, the only admitted supervisors consulted were Brummerstedt and McNutt. Brummerstedt knew the reason for the first layoff, and so testified when called by the General Counsel as described above. McNutt was apparently consulted, or advised, of the "real reason" (to use his words to Lawson, Fultz, and Davis) for both, but he was not called by Respondent, and I have drawn the appropriate inference adverse to Respondent for its failure to do so or to explain why it did not.

Conversely, Kneisley's testimony about who was chosen to be retained on October 3 is equally incredible. Kneisley testified that, ultimately, only that personnel who were "receptive to change" were retained. How he knew the office personnel was "receptive to change" required in production was not explained by Kneisley. Furthermore, employees Baker, Horn, McCune, Patty Price, Rike, and Meyer were recalled for production in October and November. Why he felt they had become "receptive to change" between the dates of their layoffs and their recalls was also not explained by Kneisley.

[43] As noted, meaningful comparisons are impossible because only 4 months' scrap records, which constitute only a "trend," were placed in evidence.

In short, I do not believe the testimony of Kneisley that the receptiveness to change, or merit, of the employees had anything to do with the decision of who was selected for layoff. The layoff of October 3 also was not simply an attempt to reduce the labor-cost-to-shipped-sales ratio. While the ratio did drop from 51 percent to 25 percent between September and October, it is not unfair to assume that some of September's production (which took significant overtime to complete) had to be shipped in October. The ratio for November, when all those shipments had assuredly been made *and* the regular production employees eliminated, was not offered.

In summary, I find Kneisley's threefold reasons for the layoffs to constitute a complete sham. Specifically, I find the pictures Kneisley painted of himself being forced to terminate the production employees by financial reports he received immediately before the layoffs to be complete fabrications. I find that the "real reason" for the layoffs lies in the antipathy for unions held by Kneisley which, according to the credible testimony of Hirby, Kneisley had long vowed to exclude absolutely.[44] Almost immediately upon learning of the September 21 organizational meeting from Patty Price and Baker, Kneisley counseled with Brummerstedt. Together they selected the suspected leaders, Morris, Hirby, and Lawson. Morris and Hirby were immediately laid off and, according to the credible testimony of Brummerstedt, because he "knew that was going to be questioned," Kneisley also included Hine, Hefelfinger, Harleman, Fultz, and Seabold. Brummerstedt communicated this information to Supervisor Myers and Myers conveyed it to employee Wolfenbarger. This latter action, the General Counsel contends and I agree, is an independent violation of Section 8(a)(1) of the Act. Brummerstedt further told Myers at one point that, although employees were to be terminated because of the organizational activity, they would be proffered the pretext that the action was being taken "because of the EPA and because of lack of work."

Then, I find, because Kneisley learned from Hole's call to Smock that activity was continuing and the employees had hired a lawyer to help them, that is exactly what happened on October 3. The only change was that Kneisley added the "scrap" pretext to the litany to be repeated by those charged with implementing his decision. Lovejoy could not keep it straight, or she tried to improve on it—she told Betty Baker that "EPA has closed them up." Baker knew that was not true and told Lovejoy so. Lovejoy (in an apparent degree of veracity which caused Respondent to decline to call her to testify or explain not doing so) replied: "I know, but this is what I was told to tell you." Other supervisors or agents forgot the "scrap" or "lack of work" pretexts. The inability to keep the reasons straight (Kneisley himself left out "scrap" the first time at the hearing he tried to advance an explanation for the layoffs) is further demonstration that they were false.

More direct evidence was adduced: McNutt told employee Davis on September 29 that the employees were going to be laid off the following week because "Dan has it all figured out in his head how he's going to beat this thing." McNutt told Lawson, one of the employees suspected by Kneisley to have been an initial organizer, that "we both know the real reason why the layoffs." The same statement was made by McNutt to Fultz. McNutt was again being enigmatic, but it was clear that he was conveying to the employees that the responsibility for the layoffs was the organizational attempt; it was the only unusual "thing" which was occurring at the plant at the time, at least as far as the employees knew, and it was assuredly the "real reason why the layoffs."

However, the processes of deduction are hardly required to arrive at the same conclusion; Lovejoy told Pike unequivocally that the reason for the layoff of October 3 was the organizational attempt. Of like compelling nature is the credible testimony of Brummerstedt that the attempt was the sole reason for the terminations of September 26.[45] This evidence makes the conclusion inescapable that all employees who were "laid off" (actually discharged[46]) on September 26 and October 3, 1977, were discriminated against by Respondent in violation of Section 8(a)(3) of the Act.

B. *Creation and Operation of the Third Shift*

Assuming that some employees had to staff a third shift, this still does not explain why only employees returned pursuant to the settlement agreement and those who had previously been recalled who had signed union authorization cards which were shown to Kneisley on March 8[47] were assigned to it. Daniel Kneisley offered generalized testimony, which I do not credit, that somehow the jobs were then more difficult and the returning employees were placed on the third shift for training in vaguely described new procedures. However, there is no evidence that any of the so-called "new procedures" required special skills or training. In fact, from this record all the production jobs were unskilled and required little training.

I find and conclude that the third shift was created and only union adherents (or "union people" as Third-Shift Supervisor Leffew categorized them) assigned to it because of the inherently more onerous nature of those working hours and the facility it presented for isolating the employees assigned to it.

I do not believe Kneisley's testimony of why a third shift was created rather than assigning the returning employees to the first or, at least, the second shift. I discredit the testimony of Stump as well, that any production employees would have been in the way of the maintenance crew on the second shift. Until April 15, the maintenance crew was able to work around the first shift

[44] Also relevant to this conclusion is the undenied credible testimony of employee Judith Weber that, a few weeks before she quit on June 16, Brummerstedt told her that Kneisley "would never have a union in the shop, and he would do anything to prevent it."

[45] *Marcel Schurman Co., Inc.*, 238 NLRB 1277 (1978).

[46] Since the employees were not afforded recall rights, they were actually discharged even though they were told they were "laid off" and some were told when to expect recall. No matter which words were used at the time of termination, or in the complaint, the remedy is the same. *Trojan Transportation, Inc.*, 249 NLRB 642 (1980).

[47] Baker and Meyer.

production employees without apparent difficulty. Also, employee Mike Rike, who Stump testified was transferred from production to maintenance because of his ability to help in the EPA work, is shown by Respondent's Exhibit 44 to have worked exclusively on the *first* shift, not the second; therefore the extent of "second shift" EPA work is entirely conjectural.

The complaint alleges that Respondent isolated union adherents from employees who were not. I agree. Respondent manipulated the lunch periods of those union adherents who were briefly allowed on the first shift. It transferred them to the third shift. On the third shift it required them to report to the lunchroom for assignments at the start thereof and released them one-half hour before the first shift reported. By these actions their isolation was complete; they were quarantined from the other employees as if they were possessed of some dread communicable disease. This isolation of employees because they were union adherents who had invoked Board processes which led to the March 8 settlement agreement constitutes discrimination violative of Section 8(a)(3) and (4) of the Act.

The General Counsel has shown that the third-shift employees alone were no longer permitted to use stools which undoubtedly made working those hours even more onerous. They were subjected to a new system of warning notices which Brummerstedt's credible testimony demonstrates was a method of "case building," not a "communications link" to help them as Kneisley testified.[48] They were subjected to a "musical chairs" exercise in Michael Kneisley's assignments to jobs which they had not done before, as Brummerstedt told Myers, in an attempt again, to make working for Respondent more difficult. Each of these actions constituted group discrimination against the union adherents, and each constitutes independent violations of Section 8(a)(3) and (4) of the Act.

The complaint further alleges that, beginning March 8, Respondent discriminatorily intermittently laid off the recalled employees[49] and refused to allow them to finish their workdays. I agree. Respondent's records analyzed above plainly demonstrate that non-card-signing employees were almost invariably permitted to finish a 40-hour week while card signers (while on the third or temporarily on the first shift) were sent home early, even if only tenths of hours in days, or weeks, were left in a workweek. The only possible explanation for this selective niggardliness in the distribution of the work is the fact that one group had signed cards designating the Union as their collective-bargaining representative and others had not.

The records from the week ending May 18 reflect a pattern of systematic discrimination against union adherents. While a few of the short weeks of the third-shift employees were explained by either their quitting in midweek or illness or other specific reasons, the only explanation offered by Daniel Kneisley when he was called to testify about most of the reduced workweeks of third-shift employees was that "lack of work" in various departments was responsible. He explained some of the overtime that the first-shift employees received by pointing out that Sharon Scott and Opha Mast were inspectors who were doing a great deal of work in actual production of the boards, and that David McCune was given extra overtime to mix chemicals in the plating department. It is beyond dispute that this was production work necessarily denied the card signers. Also, it is to be noted that Kneisley, when testifying about why the second shift was abolished, testified that the time was also used as "carry over hours" so that the first shift could finish its work on overtime. In so doing, Kneisley acknowledged that a decided preference was given to the first-shift employees in regard to overtime while the third-shift employees, according to the records and the testimony, were not only denied overtime, they also were sent home early even when only tenths of hours remained on the shift.[50] After May 1, the first shift was staffed almost entirely by nonunion employees.[51] Assuming the most modest desire for continuity of workflow, the only distinguishing factor between the treatment of the two shifts is that those on the third had signed authorization cards for the Union.

Therefore, I find and conclude that the General Counsel, in addition to the various forms of unlawful discrimination imposed on the third-shift employees mentioned above, has established that Respondent intermittently laid off and shortened the workdays of the group[52] of employees who had signed cards authorizing the Union as their collective-bargaining agent and had been recalled pursuant to the settlement agreement of March 8 and that all of said actions violate Section 8(a)(3) and (4) of the Act, as alleged.

Finally, I conclude that the General Counsel has proved that the employees recalled pursuant to the settlement agreement were discriminated against in violation of Section 8(a)(3) and (4) of the Act when they were required to take math tests and fill out new applications. While it is true that there is no evidence that the employees were deprived of any seniority rights which had not already been extinguished in the terminations of September 26 and October 3, and it is further true that Hirby refused to take the test and was not penalized, it is clear that the employees were told that a condition of their resumed employment was not that they complete the applications and tests. Since the only reason they were subjected to such processes was that they had been unlawfully terminated because they had engaged in

[48] The complaint alleges, and I find and conclude, that, as a part of this case-building system of warning notices, employee Gary Flory was forced to sign the May 30 warning notice that if he produced any more scrap he would be discharged. Whether or not the warning was warranted, the written memorandum was a product of a warning system imposed in violation of Sec. 8(a)(3) and (4) of the Act, and the issuance thereof likewise violates those sections.

[49] The allegation includes Elmer King. Apparently this is by inadvertence since King was not "laid off" at any time.

[50] It is also to be noted that the staffing of the first shift included two part-time employees (Jamison and Scott), thus commensurately reducing the work opportunities for the third shift.

[51] The only exception is Morris' employment for 2 weeks and 2 days before she quit.

[52] Although the complaint names specific employees discriminated against in this regard, the General Counsel did not ask for a remedy in each case, contending at the hearing that the matter was placed in issue only to show a pattern of discrimination.

union activities and invoked Board processes, it is clear that the tests and applications were conditions of employment which strike at the heart of the Act's protective provisions. The fact that an exception was made in Hirby's case when he refused to take the test does not prove that if any other employees had done likewise they too would have been reemployed.

Even if their seniority or other rights were not directly affected after March 8, the requirement of math tests and applications of the reemployed employees constitutes an independent violation of Section 8(a)(1) of the Act. The process demonstrated to the employees that they were on a different employment footing from that which they enjoyed before their terminations of September 26 and October 3. Respondent, in effect, was telling them that they were starting all over and they had to prove their worthiness again, all because they had engaged in activities protected by Section 7 of the Act. The inhibiting effect is obvious and it would necessarily interfere with, restrain, and coerce Respondent's employees in any future exercise of their rights guaranteed in Section 7 of the Act.

I have previously found, contrary to the contention of the General Counsel, that there is insufficient evidence to prove that Respondent reduced restroom privileges to the third-shift employees. I also find, further contrary to the General Counsel's contention, that there is insufficient evidence that Respondent discriminatorily denied smoking privileges to the third-shift employees. While the employees testified that new "No Smoking" signs were put up, there is no evidence that they did not remain up when the first shift reported and no credible evidence that the signs were intended other than to make the plant safer from the peril of fire.

I further find the evidence regardinq the May 11, 1979, 2-day layoff of employees Betty Baker and Harold Teaford insufficient to make out a violation of the Act. The layoff was remote in time from all the other events of the case, occurring 9 months after bargaining had terminated and almost a year after the third shift was discontinued. There is no indication that the reason given by Leffew and Kneisley—EPA changes—was this time false; in fact, the State of Ohio by that point had instituted legal proceedings against Respondent. Moreover, a third employee, Scroggins, was laid off at the same time for the same stated reason and there is no contention that Respondent's action in Scroggins' case was in any way unlawful. Finally, if one employee was to be retained, it made good business sense to retain the one who was salaried and getting paid anyway. This was Leffew's sworn reason for retaining "management trainee" Fenton over Baker and there is no probative evidence that it was false. In Teaford's case there is nothing but absolute speculation to support the contention that the layoff was caused by improper motive. Accordingly, I shall recommend that the allegations regarding the May 11, 1979, layoff of Teaford and Betty Baker be dismissed.

C. *Constructive Discharges*

1. Rue, Roberts, Harleman, Weber, and Price

It is clear that the employees who were assigned to the third shift were subjected to more onerous and unlawful working conditions as discussed above. The inquiry is: Did these conditions cause the employees in question to resign, and did Respondent know that the tendered resignation was premised on the conditions complained of as intolerable in court? In a case squarely on point, *Unimet Corporation*, 172 NLRB 1762 (1968), an employee was assigned a shift which, for her, was impossible to work. Rather than tell the employer it was an intolerable condition of employment the employee accepted the transfer and then simply failed to report. The Administrative Law Judge in an opinion adopted in relevant part by the Board held that no constructive discharge was made out because the employee's agreement to the assignment deprived Respondent of an opportunity for final reconsideration and rescission of its transfer order. In that circumstance no constructive discharge was found. This rule is fair; if an employer is not at least put on notice that the employee affected considers the assignment intolerable and and that it is the basis for resignation, it cannot be said that it knowingly caused the termination. After all, even though the "graveyard" shift is inherently more onerous, it is not intolerable to every employee, and some prefer it. Therefore, unless Respondent was put on notice that the assignment to the third shift is the basis for the tendered resignation, a violation cannot be said to have been made out.

Ellen Rue and Anne Roberts are the only employees who lay the necessary predicate for making a constructive discharge out of their assignment to the third shift. Rue told Brummerstedt that she could not work the third shift and asked for a transfer to the first. Brummerstedt refused and Rue immediately quit. Roberts was first assigned to the second shift, then transferred to the third after a month. She quit immediately upon the assignment, to which Brummerstedt commented, "Good." She did not give a reason and Brummerstedt did not ask. However, since the resignation was tendered immediately upon the assignment to the third shift, Respondent was effectively given notice that the assignment was the reason for the resignation. In these circumstances, I find and conclude that Rue and Roberts were constructively discharged by Respondent in violation of Section 8(a)(3) and (4) of the Act.

On the other hand, Harleman quit primarily, I find, because of his personal dislike for Michael Kneisley, and only secondarily because he was assigned to the third shift. However, no matter which reason was paramount, Harleman worked the third shift for 2 days and quit without giving reason. In the circumstances, Harleman's case falls squarely within the rule of *Unimet* and there is no constructive discharge made out.

The same is true of Price and Weber. Weber told Brummerstedt she was going to quit to go on vacation, not that the third shift was intolerable. Price worked 2 months and simply announced to Brummerstedt that she wished to stay home. Accordingly, it must be concluded

that Weber and Price were not constructively discharged by Respondent.

2. Salyers and Meyer

Salyers' case requires no legal analysis. She was not deprived of work to the extent she claimed in her affidavit, and her quitting, accordingly, cannot be held to constitute a constructive discharge.

Scott Meyer quit rather than produce a physician's excuse. This is hardly an "intolerable" condition assuming that it was discriminatorily imposed by Brummerstedt. Moreover, this is an assumption in which one may not logically indulge since it was Meyer, not Brummerstedt, who brought up the possibility of a noxious effect upon himself of the chemicals being used. In this circumstance, Brummerstedt's requirement of a physician's clearance was neither illogical nor unreasonable and certainly not intolerable.

D. *Discharges*

1. King

Although it is clear that Stump bore animus toward King because of the employee's protected activity—his appearance at the March 8 Board hearing and settlement conference—the inquiry hardly stops there. There is no real dispute by the General Counsel that King was, in fact, incompetent. While it is true that Respondent had endured King's incompetence for about 6 years, and Stump himself had put up with it from November 7, it cannot seriously be argued that Respondent should be required to endure it forever, even though Respondent also was hostile toward either King's appearance on March 8 or his union membership which was disclosed in the card check of that date, or both. Also, it is significant that Magness and McCray were discharged as part of the same decision that affected King; and the General Counsel makes no contention on their behalf. Specifically, the General Counsel does not contend that they were discharged in an attempt to "get" King, which, if proven, would constitute a violation in their cases. Nor does the General Counsel contend that King, because of superior abilities, should have been spared when Magness and McCray were discharged.

In these circumstances, I find that, while there was animus toward King's protected activities, he was discharged solely for incompetence, and by said discharge Respondent has not violated the Act.

2. Horn

Shirley Horn was competent enough a worker to have been one of the few voluntarily recalled by Kneisley after the October 3 "layoff." She was even good enough to get a raise when Respondent's other labor costs had been substantially increased by the recall which began after the March 8 settlement. (The degree of concern with labor costs professed by Kneisley, *supra*, should be remembered.)

Horn was discharged 2 weeks after her raise, without warning of any deterioration in her performance, because, as Kneisley put in writing to his lawyer, she "just could not do job." This is totally inconsistent with Crawley's testimony that Horn was, despite a physical handicap, a superior worker and is further inconsistent with the fact that she received a raise when, according to this record, almost no one else did. This conflict is fatal to any contention that Horn was discharged for any consideration relating to merit. Also Crawley's testimony that Horn was "laid off" for lack of work cannot withstand scrutiny. No other employee was terminated for "lack of work" and the gold room is just one link in the production chain. Respondent did not just stop gold plating the connections on circuit boards; the gold room was not dismantled. Even if it had been, there is no evidence that Respondent had even tried to find something else for Horn to do in the plant. All the employees on the third shift were given new jobs, even when some training was required, but not Horn, even though her supervisor praised her soundly and Kneisley presumably thought her "receptive to change" (to use his words) enough to call her back from the October 3 layoff without compulsion of Board Order or even a settlement agreement.

Further belying the contention that Horn was terminated because of lack of work in the gold room is the fact that she was given no consideration in June when Morris, who had not worked the gold room before, was recalled and placed there.

Finally, Crawley told Horn that she was laid off because of lack of work, but he would have to tell the Ohio unemployment compensation authorities that she was fired, so that her right to unemployment compensation would not be contested. The ambivalencies or inconsistencies demonstrate that the justifications which would be advanced for the discharge had not even been clearly formulated at the time it was implemented; that is, Crawley's statements to Horn further demonstrate the false nature of the reasons advanced for the discharge.

Horn was the only card signer whose identity was disclosed to Kneisley on March 8 who was not exiled, immediately or ultimately, to the third shift.[53] Perhaps it was because she was responsible for two children and would have to be at home at night, and Respondent knew her transfer to the third shift could not possibly withstand scrutiny in a constructive discharge context that she was not given the "opportunity" to transfer to the third shift. I need not speculate. The reasons asserted for Horn's discharge are plainly false, and I find and conclude that the real reason for her termination lies in the fact that hers was one of the authorization cards shown to Kneisley on March 8 and she was discharged as a part of Kneisley's determination to isolate or eliminate every employee who had joined the Union.

Therefore, I find and conclude that Respondent discharged Shirley Horn in violation of Section 8(a)(3) of the Act.

3. Lawson

The General Counsel does not contest Michael Kneisley's testimony of the number of times Lawson was

[53] I exclude Morris who, like many others, was initially sent to the first shift upon recall, but quit 2 weeks later.

tardy or absent. The General Counsel argues that Lawson's record "does not present sufficient justification, in the circumstances of this case, to warrant a finding that Lawson was discharged for cause." Of course, in so arguing, the General Counsel is attempting to substitute his judgment for that of Respondent as to what constitutes "sufficient justification." There is no evidence of discrimination; no employee, before or since, including Lawson, was shown to have an equal or worse attendance record.

Therefore, while Lawson was (correctly) suspected by Daniel Kneisley to be a member of the *avante garde* which formed the Union, and at the time of his discharge Lawson was the president of the Union (and further assuming Respondent's knowledge of that fact), and while Lawson was a victim of Respondent's animus in being discharged on October 3 and later transferred to the third shift (and deprived of his group leader position) in the first place, there is no effective refutation of Michael Kneisley's testimony that he considered Lawson's absentee and tardiness record excessive, and that Lawson was discharged for that reason alone.

Accordingly, I find and conclude that Respondent has not violated the Act in the discharge of Lawson.

4. Victor

Marlene Victor's case presents the hardest questions among the discharges. She was a victim of Respondent's animus when she was terminated on October 3 and she was later discriminatorily assigned to the third shift along with the rest of the employees involved in the settlement agreement or who had signed cards for the Union. She was given the new job of running the etcher and she had received no previous warnings regarding scrap. Then the first time, according to this record, she had some she was fired.

However, she did not just scrap one or two boards; she scrapped eight. Crawley's credible testimony was that the operator of the etcher would know when more than a couple of boards were scrapped, and Victor did not deny it. There is no evidence that any other employee scrapped as many as eight boards at one time and was not disciplined. Therefore, there is no evidence of discrimination. While the punishment of discharge may seem severe, it is not the place of the Board to sit in judgment on the degree of discipline imposed absent evidence of unequal penalties for like offenses.

Accordingly, I find and conclude, although the case is not without its suspicions, that the General Counsel has not proved by the preponderance of the evidence that Victor was discharged in violation of the Act.

E. *Bargaining Obligation, Bargaining After Settlement Agreement, and Alleged Unilateral Actions*

Received in evidence (G.C. Exh. 21) was a list of names and dates of hire of 43 employees of Respondent as of September 26. By counsel, Respondent stipulated that each of the listed employees was a member of the production and maintenance unit found appropriate herein subject to his review of all employee records before the close of this hearing. Respondent made no attempt to secure additions or deletions, therefore I find that the employees listed were all of these employed in the production and maintenance unit on September 26. None of the listed employees was hired between September 21 and 26. Therefore, the 28 cards authorizing the Union as the collective-bargaining agent of the signatory employees secured at the September 21 union meeting conducted by Attorney Hole constitute probative evidence as of that date the Union had secured status as the majority representative of the employees.

The General Counsel first contends that by letter and by telephone Hole requested bargaining on September 26 on behalf of the Union. As noted above there is no probative evidence that Hole's letter of that date was sent and received as of that date or, in fact, any time thereafter until this matter was in the process of investigation by the Regional Office. Hole's verbal communication to Smock on September 26 that a union was being formed by the employees and that it desired negotiations does not constitute a request for recognition and bargaining since it did not claim majority status, nor did it indicate how, or to whom, Respondent was to reply, nor did it propose any meeting date or any other method of initiating bargaining. *Sheboygan Sausage Company, Inc.*, 156 NLRB 1490 (1966).

However, this does not end the inquiry.

The Supreme Court states in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 614–615 (1969):

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . .

After Wolfenbarger was threatened by Myers on September 25, 7 members of the bargaining unit were discharged on September 26, and an additional 28 were discharged on October 3. Upon the mass discharge the employees were given the clear impression by admitted Supervisor McNutt that the "real reason" for the discharges was their selection of the Union as their collective-bargaining representative; Donna Lovejoy, whom I have found to be Respondent's agent at the time, if not a supervisor within the meaning of Section 2(11) of the Act, stated unequivocally he told them the same thing.

By these threats and discharges in the first 10 days after Daniel Kneisley became aware of the organizational attempt, it has been made known to all present and future employees of Respondent that Respondent will take any action Kneisley deems expedient to defeat their rights under the Act to organize and bargain collectively, that is, without Board Order, as Brummerstedt told Weber, "Dan would never have a union in the shop and he would do anything to prevent it."

Therefore, even without an express demand for bargaining by the Union and express refusal by Respondent, a bargaining order from the inception of Respondent's violative course of conduct, September 25, 1977, is mandated. *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977).

While the General Counsel has proved, under Board and court authority, the necessity for a remedial bargaining order dating from the day Respondent embarked on its violative course of conduct, September 25, absent a demand for recognition, a violation of Section 8(a)(5) has not been made out from that date. Therefore I shall recommend dismissal of the complaint's further allegations that the terminations of September 26 and October 3 (and the independent violations of Sec. 8(a)(1) occurring immediately in connection herewith) also violate Section 8(a)(5) of the Act.

Next arises the question of whether Respondent satisfied, or violated, its obligation to bargain under the Act by its actions after March 8, 1978, when, it is undisputed, it received a competent demand for recognition from the Union and, by the settlement agreement of that date, it acceded to the request.

Section 8(a)(5) of the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F.2d 299, 231 (5th Cir. 1960). As the Supreme Court stated in *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Insurance Company of America]*, 361 U.S. 477, 485 (1960):

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.

This obligation does not compel either party to agree to a proposal or make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952); specifically, it does not compel agreement on checkoff, *H.K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970). However, the Board may, and does, examine the contents of the proposals put forth for "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiation," *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887.

Pursuant to these principles I have considered the course of the bargaining. Full consideration leads me to conclude that Respondent has failed to fulfill its statutory obligation and was, as the General Counsel alleges, engaging in "surface" bargaining, or bargaining without intent to reach an agreement.

To decide whether an employer has approached and remains at the bargaining table in good faith requires determination of the existence or nonexistence of many elements including the delay or refusal to bargain economic items,[54] the advancement of predictably unacceptable proposals,[55] or the "reasonableness"[56] of the justifications advanced for proposals which are questioned.

Respondent, by Brown, from March 8 through August 30, over the Union's objections, refused to discuss economic items on the ground that all other matters had to be resolved first. Then it offered nothing in the form of wages or other economic benefits except for a slight increase in its assumed share of insurance premiums. Respondent's refusal to discuss economic items followed by a proposal only for a wage reopener was guaranteed to frustrate agreement; it thus constitutes evidence of bad faith.[57]

Respondent's insistence upon its probationary period and arbitration clauses is further evidence of bad faith. It proposed for no advanced reason an increase in the probationary period, from 30 to 90, then (as an apparent sop to the Union) reduced it to 60 days. The predictably unacceptable nature of the proposal is obvious. The proposal that arbitration decision must be rendered in 30 days was similarly predictably unacceptable. The proposal rendered the arbitration clause nugatory because, as demonstrated by this case, labor relations complexities cannot always be unraveled in a limited amount of time. For this reason Hole steadfastly rejected Brown's proposal on arbitration and Respondent's insistence thereupon constitutes further evidence of a bad-faith approach to its bargaining obligation.

It is further clear that, at all times during the negotiations, Respondent refused to consider the Union's checkoff proposal. While Brown testified that at one point he told the Union that administrative costs were its reason for refusal to agree to any such proposal, the administrative costs would clearly have been minimal in view of the established computerized payroll upon which entry of a checkoff deduction would have been an easy matter. Accordingly, I find that the "administrative costs" reason advanced for refusal of checkoff was purely spurious and that Respondent's absolute refusal to consider the Union's proposal is further evidence of bad faith.

Additionally, it is clear that Respondent's rigid position on each of the foregoing[58] issues constituted insurmountable stumbling blocks in the way of any attempt to secure a contract covering the employees of Respondent

[54] *Federal-Mogul Corporation* v. *N.L.R.B.*, 524 F.2d 37 (6th Cir. 1975).

[55] *Continental Insurance Co.* v. *N.L.R.B.*, 495 F.2d 44 (2d Cir. 1974); see also *Seattle-First National Bank*, 241 NLRB 753 (1979), and cases cited therein.

[56] See *N.L.R.B.* v. *Reed & Prince Manufacturing Company, supra.*

[57] Specifically, see *N.L.R.B.* v. *Federal-Mogul Corp., supra*, where the Board, with approval by the Sixth Circuit, condemned the tactic of delaying economic proposals until acceptance of other proposals which were advanced and insisted upon in bad faith (such as arbitration exclusion of checkoff and probationary period herein).

[58] I find that the evidence is insufficient to prove that Respondent refused to bargain about "smoking rights" and seniority, as further alleged by the General Counsel. I further reject the General Counsel's contention that by refusing to adopt language contained in a preexisting employee handbook Respondent has further violated the Act. Without analytical support, the General Counsel contends that, by refusing to adopt the language of the handbook, Respondent was refusing to agree to continue existing conditions. I decline to make the analysis for him and I find that the General Counsel has failed to establish this element of the alleged violations.

K & S Circuits, Inc,[59] and that its course of conduct at the bargaining was designed to frustrate the collective-bargaining process. All of said conduct was in violation of Section 8(a)(5) of the Act, and I so find and conclude.

The complaint further alleges that Respondent violated Section 8(a)(5) "by unilaterally abolishing a major portion of the work performed by employees in the unit . . . through the transfer of plant machinery equipment and work of Respondent Circuits to Respondent Products and/or Respondent D-K Sales and Service in late spring 1978."[60] I have found that work and employees were transferred from Respondent Circuits to Respondent Products and Respondent D-K, and that the work involved had been an integral part of the entire production process. However, while it is clear that a part of the work which would have been performed by unit employees was transferred, the General Counsel has failed to prove that it was "a major portion" of Respondent Circuits' work, or anything like it. Also, it is to be noted that Brown credibly testified that he acknowledged to the Union that the work was being transferred. However, there was no request from the Union to bargain on the decision or its effects upon the employees; specifically, there was no request for information about the nature and volume of the work transferred. Where a union simply states an objection (which is not even credibly shown here), and does nothing more than file a charge about such unilateral action, there is no effective request to bargain, and no violation of Section 8(a)(5) of the Act made out. *Citizens National Bank of Willmar*, 245 NLRB 389 (1979).[61]

Finally, the General Counsel contends that Respondent's admitted failure to pay $12,000 of the $20,000 promised in the March 8 settlement agreement constitutes an independent violation of Section 8(a)(5) of the Act. The General Counsel cites no authority for such a proposition and the only argument he makes is that the failure "could only undermine the Union's standing with the employees." Assuming the truth of this unsupported assertion, not every action by an employer which lowers its employees' estimation of their collective-bargaining representative can be said (except by circular reasoning) to violate Section 8(a)(5) of the Act. Accordingly, I find and conclude that the General Counsel has not established a violation in this regard.

[59] The complaint also alleges that Respondent D-K and Respondent Products have violated Sec. 8(a)(5). If there had been a request and refusal to bargain on behalf of the employees of those corporate creations of Kneisley, and if they constitute an accretion to the unit stipulated to be appropriate on March 8, 1978, a violation could have been made out (no matter if the production and/or maintenance employees were classified as "technical," "supervisory," or "management trainees"). However, there was no such request and, therefore, no violation in this regard.

[60] The complaint also alleges that Respondent violated Sec. 8(a)(5) of the Act at some unspecified time after "mid-March 1978" by "unilaterally reducing available employment opportunities" of the unit employees. The General Counsel has not indicated to what he refers in this paragraph, and I am assuming it is also the transfer of the work to the new corporations credited by Kneisley.

[61] Although employee Stukins credibly testified that, in December 1978, Stump told her she could transfer from Respondent Circuits to Respondent Products, "if you don't bring the Union down," there is no allegation that the transfer of work or a failure to transfer employees constitutes a violation of Sec. 8(a)(3) of the Act.

F. *Effect of the March 8, 1978, Settlement Agreement and the Board's Order Reinstating the Original Complaint*

As the multitudinous and multifarious post-settlement violations found herein prove, the Board was entirely correct in holding that the entire matter should be set down for hearing by reinstitution of the original complaint.

Respondent contends that its treatment of the employees involved in the settlement agreement cannot be considered a breach thereof because the word "recall" was often used therein, not "reinstated." This contention is invalid for the following reasons: (1) The document was never signed, not even by Respondent, so the placing of particular magic in one term is entirely inappropriate; moreover, the term "reinstatement" was, in fact, used (par. 2). (2) The employees had been told only that they were suffering a "layoff," and "recall" is the logical analog of that term. It is true that, since they were not afforded recall rights, they were actually discharged, not laid off,[62] but Respondent's seizing upon Kneisley's misrepresentation of the nature of their terminations is a cynical attempt at sophistry in place of substance. (3) Most importantly, the use of the word "recall" did not license Respondent to discharge (directly or constructively) or isolate employees to transfer them to an inherently more onerous shift, deprive them of work, assign them new jobs in an attempt to make employment more onerous, subject them to a discriminatory written warning system, require new applications and math tests from them, and even remove their work stools, all because they had joined the Union and then been "recalled" because Board processes had been invoked on their behalf.

Similarly invalid is Respondent's contention that it is excused from contractual (or statutory) obligations toward the recalled employees because the Union was guilty of a prior breach in its failure to submit waivers of reinstatement of all employees whom it did not recall. The employees had been discharged unlawfully and the Union had no authority to waive their statutory rights to reinstatement. Moreover, as its violative treatment of the "recalled" employees proves, Respondent did not reinstate, and had no intention of reinstating, any employee recalled pursuant to the settlement agreement; what is not being offered cannot be waived.

Accordingly, I find that the Union has not breached any of its duties under the March 8, 1978, settlement agreement.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent K & S Circuits, Inc., set forth above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[62] See *Trojan Transportation, Inc., supra*, fn. 46.

CONCLUSIONS OF LAW

1. Respondents K & S Circuits, Inc., K & S Circuit Products, Inc., and D-K Sales and Services, Inc., constitute a joint or single employer within the meaning of Section 2(2) of the Act, engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. P.C.B. Workers Local Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining:

> All hourly production and maintenance employees at K & S Circuits, Inc.'s Phillipsburg, Ohio facility, but excluding all other employees including office and clerical employees, technical employees, professional employees, inspectors, sales employees, guards and supervisors as defined in the National Labor Relations Act.

4. At all times, since September 21, 1977, the Union has been the exclusive collective-bargaining representative of the employees in the unit described above.

5. Since on or about March 8, 1978, and continuing thereafter, Respondent K & S Circuits, Inc., has failed and refused to bargain collectively in good faith concerning wages and other terms and conditions of employment of the employees in the unit described above in violation of Section 8(a)(5) of the Act.

6. By its conduct of September 26 and October 3, 1977, in discharging the following-named employees because of their known or suspected activities on behalf of or sympathies with the Union, and/or because of other employees' known or suspected activities on behalf of or sympathies with the Union and/or because of a desire and intent to destroy any actual or potential majority status which might have been, or was, attained by the Union, Respondent K & S Circuits, Inc., has discriminated against employees in violation of Section 8(a)(3) and (1) of the Act.

Jack Harleman	Carl Hofacker
Kurt Hefelfinger	Shirley Horn
Della Hine	Ronald Johnson
Paul Hirby	Harry Jordon
Nelda Morris	Delmar Lawson
Julia Sanders	Glenna Long
Lois Seabold	David McCune
Betty Baker	Scott Meyer
Ola Davis	Barbara Moffatt
Gary Flory	Roberta Pike
Judy Hall	Georganna Price
Greg Harris	Patty Price
Idella Stukins	Mike Rike
Harold Teaford	Anne Roberts
Marlene Victor	Ellen Rue
Judith Weber	Virginia Salyers
John Whiting	Lisa Shrewsberry
Michael Wolfenbarger	

7. By the following acts and conduct on and after March 8, 1978, engaged in because its employees had invoked the processes of the Act, or said processes had been invoked on their behalf, and/or known union membership, activities, and desires, Respondent K & S Circuits, Inc., has discriminated against employees in violation of Section 8(a)(4) of the Act, as well as Section 8(a)(3) and (1):

(a) Assigning employees to a shift inherently more onerous.

(b) Isolating employees, requiring them to fill out application forms, removing their work stools, subjecting them to a discriminatory written warning notice system (including specifically the written warning issued to employee Gary Flory on May 30, 1978), and reducing their hours of work (including, but not limited to, overtime), and requesting them to take math tests.

(c) Constructively discharging employees Ellen Rue and Anne Roberts on April 16 and June 7, 1978, respectively, and discharging employee Shirley Horn on April 13, 1978.

8. By admitted Supervisor Lee McNutt's impliedly, and agent Donna Lovejoy's expressly, telling employees they were, or were to be, laid off, discharged, or otherwise terminated because of their union activities or the union activities of other employees; and by Meyer's telling Wolfenbarger that Daniel Kneisley knew the identity of the union adherents and they would be laid off, discharged; or otherwise terminated, which actions constitute threats to employees; and by Meyer's interrogations of Wolfenbarger, Waltz, and Mast; and by the maintenance of a rule which would prohibit distribution of union literature on nonworking time in nonwork areas, Respondent K & S Circuits, Inc., has interfered with, restrained, and coerced employees in the rights guaranteed by Section 7 of the Act, all in violation of Section 8(a)(1) of the Act.

9. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not violated the Act by discharge of employees Elmer King, Delmar Lawson, and Marlene Victor on March 29, April 21, and June 22, 1978, respectively, or by the alleged constructive discharges of employees Jack Harleman, Virginia Salyers, Scott Meyer, Georganna Price, and Judy Weber, or by any other acts and conduct made the subject of the complaint.

THE REMEDY

Having found that Respondent K & S Circuits, Inc., has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it be ordered to cease and desist from engaging in these unfair labor practices. Having further found that Respondent D-K Sales and Services, Inc., and Respondent K & S Circuit Products, Inc., are joint employers of K & S Circuits, Inc., I shall recommend that each and all of them be ordered to take certain affirmative action in order to remedy these violations, *N.L.R.B.* v. *Gibraltar Industries, Inc.*, 307 F.2d 428, 431 (4th Cir. 1962), as well as a bargaining order retroactive to September 25, 1977, the date upon which Respondent em-

barked on its unlawful course of conduct.[63] Such affirmative action will include offers of reinstatement to all unlawfully discharged employees, including specifically those "recalled" pursuant to the settlement agreement of March 8, 1978, even if they quit or were lawfully discharged from the jobs to which they were "recalled." The jobs offered pursuant to the settlement agreement, and accepted by the employees, are to be treated only as interim employment since, as Respondent's unlawful treatment of the employees who were "recalled" shows, there were no valid offers of reinstatement made to the employees pursuant to the said settlement agreement.[64] This period of interim employment, while not competent to satisfy Respondent's obligation to reinstate the employees, is sufficient to toll for its duration Respondent's backpay obligation. *Kansas Refined Helium Company, a Division of Angle Industries, Inc.*, 215 NLRB 443 (1974). All employees found unlawfully discharged, directly or constructively, shall receive backpay in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as established by the Board in *Florida Steel Corporation*, 231 NLRB 651 (19771); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Allowance should be made for any sums of money previously remitted to the Union by Respondents pursuant to the settlement agreement of March 8, 1978, and subsequently received by individual employees found herein to have been discharged unlawfully.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[65]

1. Respondent K & S Circuits, Inc., its agents, officers, successors, and assigns, shall cease and desist from:

(a) Threatening employees with discharge, layoff, or other reprisals because of their known or suspected activities on behalf of P.C.B. Workers Local Union or any other labor organization.

(b) Interrogating employees about their activities on behalf of the Union or the union activities of other employees.

(c) Maintaining in effect unlawful no-distribution rules.

(d) Discharging or laying off employees, reducing their employment hours, isolating employees, requiring them to fill out applications or take math tests or any other examinations, assigning them to unfamiliar jobs or to more onerous working hours, issuing them warning notices or otherwise discriminating against them because they have filed charges or given testimony under the Act or because charges were filed or testimony was given on their behalf, or to discourage membership in or activities on behalf of the Union.

(e) Refusing to bargain collectively in good faith with P.C.B. Workers Local Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All hourly production and maintenance employees at K & S Circuits, Inc.'s Phillipsburg, Ohio facility but excluding all other employees including office and clerical employees, technical employees, professional employees, inspectors, sales employees, guards and supervisors as defined in the National Labor Relations Act.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Respondent K & S Circuits, Inc., K & S Circuit Products, Inc., and Respondent D-K Sales and Services, Inc., shall take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with P.C.B. Workers Local Union, as the exclusive collective-bargaining representative of all the employees in the appropriate unit described above, and, if an agreement is reached, embody it in a signed contract.

(b) Offer to the following-named employees immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss of earnings and/or benefits suffered by reason of their unlawful discharges on September 26 or October 3, 1977:

Jack Harleman	Harry Jordon
Kurt Hefelfinger	Delmar Lawson
Della Hine	Glenna Long
Paul Hirby	Barbara Moffatt
Nelda Morris	Roberta Pike
Julia Ann Sanders	Georganna Price
Lois Seabold	Virginia Salyers
Ola Davis	Lisa Shrewsberry
Gary Flory	Idella Stukins
Judy Hall	Harold Teaford
Greg Harris	Marlene Victor
Carl Hofacker	Judith Weber
Ronald Johnson	John Whiting
Michael Wolfenbarger	

(c) Offer Ellen Rue and Anne Roberts immediate and full reinstatement to the jobs they held before October 3, 1977, and Shirley Horn the job she held before April 13, 1978, or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of their discharges on October 3, 1977, and

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[63] See *N.L.R.B.* v. *Gissel Packing Co., Inc.*, and *Beasley Energy, Inc., d/b/a Peaker Run Coal Co., Ohio Division #1, supra.*

[64] Conversely, no reinstatement obligation is owed David McCune, Betty Baker, Patty Price, Scott Meyer, or Mike Rike, who in October and November 1977 were offered reinstatement, in the form of a "recall," from the October 3, 1977, "layoff" which, as I have found, was actually a mass discharge.

[65] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

the subsequent discharge of Horn and constructive discharges of Rue and Roberts, plus interest.

(d) Make employees Patty Price, Betty Baker, Mike Rike, David McCune, and Scott Meyer whole for any loss of earnings they may have suffered between their unlawful discharges on October 3 and the dates they were offered reinstatement in October or November 1977.

(e) Expunge from the personnel files the warning notice issued to employee Gary Flory on May 30, 1978.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Phillipsburg, Ohio, place of business copies of the attached notice marked "Appendix."[66] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it for 60 consecutive days immediately thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[66] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act, Section 7, gives all employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT threaten employees with discharge, layoff, or other reprisals because of their known or suspected activities on behalf of P.C.B. Workers Local Union, or any other labor organization.

WE WILL NOT interrogate employees about their activities on behalf of the Union or the union membership or activities of other employees.

WE WILL NOT maintain in effect any rule which prohibits distribution of union literature on nonworking time in nonwork areas.

WE WILL NOT discharge you, lay you off, reduce your work hours, isolate you, or impose upon you any other onerous or harsh terms or conditions of employment because you or other employees have become or remained members of the Union or given aid or assistance to it. NOR WILL WE take such actions because you have filed charges or given testimony under the Act or because such charges have been filed or testimony has been given on your behalf.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in this appropriate unit:

All hourly production employees and maintenance employees at K & S Circuits, Inc.'s Phillipsburg, Ohio facility, but excluding all other employees including office and clerical employees, technical employees, professional employees, inspectors, sales employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, upon request, recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed document if asked to do so.

WE WILL offer the following-named employees immediate and full reinstatement to the jobs they held before October 3, 1977, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges:

Jack Harleman	Delmar Lawson
Kurt Hefelfinger	Glenna Long
Della Hine	Barbara Moffat
Paul Hirby	Roberta Pike
Nelda Morris	Georganna Price
Julia Ann Sanders	Anne Roberts
Lois Seabold	Ellen Rue
Ola Davis	Virginia Salyers
Gary Flory	Lisa Shrewsberry
Judy Hall	Harold Teaford
Greg Harris	Marlene Victor
Ronald Johnson	Judith Weber
Harry Jordon	John Whiting

Idella Stukins Michael Wolfenbarger
Carl Hofacker

WE WILL make the above-named employees and employees Betty Baker, Scott Meyer, Patty Price, Mike Rike, and David McCune whole, with interest, for any loss of pay they may have suffered as a result of our discrimination against them.

WE WILL offer Shirley Horn immediate and full reinstatement to the job she held before her discharge on April 13, 1978, or if that job no longer exists to a substantially equivalent job, without prejudice to to her seniority and other rights and privileges enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered because of that discriminatory discharge and her discriminatory discharge on October 3, 1977, plus interest.

K & S CIRCUITS, INC.